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No. _____

In The

Supreme Court of the United States

October Term, 1991

JOHN WRIGHT MOORE,

Petitioner,

vs.

CALIFORNIA,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeal State Of California Fifth Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether any harmless error rule can be applied to save a state criminal conviction obtained in a jury trial where that jury, or portions thereof, were not sworn to tell the truth, during voir-dire, which led to selection of that jury?

2. Whether the federal harmless error rule of *Chapman v. California* 386 U.S. 18, 24 (1967) must be applied, in the alternative to automatic reversal, to a conviction obtained in a state criminal trial where the jury is not sworn to tell the truth in jury voir-dire?

3. Whether the federal harmless error rule of *Chapman v. California* 386 U.S. 18, 24 (1967) must govern where a defendant in a state criminal trial has been denied the right to present testimony of key and relevant nature in his own defense?

4. Whether the federal harmless error rule of *Chapman v. California* 386 U.S. 18, 24 (1967) must govern where a defendant in a state criminal trial has been denied the right to present impeaching evidence against a key prosecution witness?

5. Whether an *unpublished* state appellate opinion containing error under *Chapman v. California,* 386 U.S. 18, 24 (1967) should insulate the error from a Grant of Certiorari, within the meaning and holding of *Smith v. United States* (1991) ___ U.S. ___, fn., No. 90-7347 (12-16-91)?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities v

Introduction 1

Opinion Below 2

Jurisdictional Grounds 2

United States Constitutional Provisions and Statutes Involved 2

California Code Sections Involved 3

Statement of the Case 5

Reasons for Granting Petition For Certiorari 10

Argument 11

I. THE PETITIONER WAS DENIED PROTECTION UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY BEING TRIED FOR CRIME BEFORE A JURY THAT HAD NOT ALL BEEN ENTIRELY SWORN TO TELL THE TRUTH BEFORE COMMENCEMENT OF VOIR-DIRE 11

TABLE OF CONTENTS – Continued

Page

II. THE COURT OF APPEALS OF CALIFORNIA REFUSED TO APPLY THE FEDERAL HARMLESS ERROR RULE OF *CHAPMAN V. CALIFORNIA* (1967) 386 U.S. 18, 24 AND, INDEED, CLAIMED IT NOT APPLICABLE, TO DENIAL OF THIS PETITIONER'S 6TH AMENDMENT RIGHT TO CALL A WITNESS IN HIS DEFENSE (HIMSELF) AND PRESENT PETITIONER'S REBUTTAL VERSION TO AN ALLEGED ADMISSION/CONFESSION OF PETITIONER PRESENTED BY A STATE WITNESS OF QUESTIONABLE CREDIBILITY. CERTIORARI MUST BE GRANTED TO REAFFIRM THAT THE CHAPMAN TEST GOVERNS ALL ERRORS OF CONSTITUTIONAL DIMENSION IN STATE CRIMINAL PROSECUTIONS INVOLVING THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION..... 13

III. THE COURT OF APPEALS OF CALIFORNIA REFUSED TO APPLY THE FEDERAL HARMLESS ERROR RULE OF *CHAPMAN V. CALIFORNIA* (1967) 386 U.S. 18, 24, PROVIDED IN *DELAWARE V. VAN ARSDALL* (1986) 475 U.S. 673, TO THE TRIAL COURT'S DENIAL OF ALLOWING PETITIONER TO SHOW THE BIAS OF KEY PROSECUTION WITNESS BILL BAIER, AND IN FACT SHIFTED THE BURDEN TO PETITIONER TO SHOW THAT PETITIONER WAS HARMED BY THIS ERROR, A VIOLATION OF THE BURDEN RULE OF *CHAPMAN V. CALIFORNIA* (1967) 386 U.S. 18, 24 21

Conclusion 26

TABLE OF CONTENTS – Continued

Page

Appendix

(a) Opinion, Court of Appeal State of California, Nov. 22, 1991.....A-1

(b) Order Denying Review by Supreme Court of California, February 19, 1992..... B-1

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Fulminante (1991) 499 U.S. ___, 111 S.Ct. 1246, 113 L.Ed.2d 302 20

Chapman v. California (1967) 386 U.S. 18 ..... *passim*

Clark v. Moran, 749 F.Supp. 1186 (D.R.I. 1990) 20

Delaware v. Van Arsdall (1986) 475 U.S. 673 ..... 8, 9, 19, 21, 23, 25

Fahy v. Connecticut (1963) 375 U.S. 85 ..... 13, 15

Fernandez v. Leonardo, 742 F.Supp. 55 (E.D.N.Y. 1990) 20

Fleming v. Collins, 917 F.2d 850 (5th Cir. 1990) 20

Harrington v. California (1969) 395 U.S. 250 19

Kordenbrock v. Scroggy, 919 F.2d 1091 (6th Cir. 1990) 20

Lesko v. Lehman, 925 F.2d 1527 (3rd Cir. 1991) 20

Moore v. Illinois (1977) 434 U.S. 220 19

Ouimette v. Moran, 762 F.Supp. 468 (D.R.I. 1991) 20

People v. Crowl (1938) 28 Cal. App. 2d 299 16

People v. Robinson (1964) 61 Cal. 2d 373 5

People v. Watson (1956) 46 Cal. 2d 818 ..... 5, 7, 16

Pope v. Illinois (1987) 481 U.S. 497 18

Rose v. Clark (1986) 478 U.S. 570 ..... 18, 19

Sandstrom v. Montana (1979) 442 U.S. 510 19

Satterwaite v. Texas (1988) 486 U.S. 249 20

TABLE OF AUTHORITIES – Continued

Page

Schneble v. Florida (1972) 405 U.S. 427 19

Shearley v. Seabold, 929 F.2d 272 (6th Cir. 1991) 20

Smith v. United States (1991) ___ U.S. ___ 21

United States v. Daniel, 932 F.2d 517 (6th Cir. 1991) 20

United States v. Hasting (1983) 461 U.S. 499 19

CODE SECTIONS

California Code of Civil Procedure 232(a) 3, 10, 11

California Penal Code 1111 3

California Evidence Code

356 ..... 4, 7, 22

780 ..... 4, 9, 22

1235 ..... 5, 7, 22

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PETITION FOR WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

John Wright Moore, petitioner, seeks a writ of Certiorari to the Court of Appeal of the State of California for the Fifth Appellate District from the opinion entered November 22, 1991, hearing denied February 19, 1992 by the Supreme Court of California.

OPINION BELOW

The Court of Appeal of the State of California, Fifth Appellate District, entered its unpublished opinion, People v. John Wright Moore, on November 22, 1991. A timely petition for Review was denied on February 19, 1992 by the Supreme Court of California. Copies of these opinions and orders appear in the Appendix, A-1 and B-1, respectively.

JURISDICTIONAL GROUNDS

(i) The Court of Appeals of the State of California affirmed the conviction of petitioner by an unpublished opinion entered November 22, 1991. A copy of that opinion appears at Appendix A-1.

(ii) The Supreme Court of California entered an order denying review on February 19, 1991. A copy of that order appears at Appendix B-1.

(iii) Jurisdiction to review by certiorari a decision of a state court of last and highest resort in a criminal case is provided under 28 U.S.C. 1257.

U.S. CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT [VI.]

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,

which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATE CODE OF CIVIL PROCEDURE SECTIONS INVOLVED

C.C.P. 232(a):

§ 232. Acknowledgement and Agreement Concerning Perjury.

(a) Prior to the examination of prospective trial jurors in the panel assigned for voir dire, the following perjury acknowledgement and agreement shall be obtained from the panel, which shall be acknowledged by the prospective jurors with the statement "I do":

"Do you, and each of you, understand and agree that you will accurately and truthfully answer, under penalty of perjury, all questions propounded to you concerning your qualifications and competency to serve as a trial juror in the matter pending before this court; and that failure to do so may subject you to criminal prosecution."

STATE PENAL CODE AND STATE EVIDENCE CODE SECTIONS INVOLVED

PENAL CODE 1111:

§ 1111. Testimony of Accomplice – Who Are Accomplices.

A conviction cannot be had upon the testimony of an accomplice unless it be corroborated

by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

EVIDENCE CODE 356:

§ 356. Partial or Detached Act, Conversation, Etc. – Inquiry Into Whole – Explanation.

Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.

EVIDENCE CODE 780:

§ 780. Credibility Generally.

Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

* * *

(f) The existence or nonexistence of a bias, interest, or other motive.

EVIDENCE CODE 1235:

§ 1235. Inconsistent Statements.

Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.

STATEMENT OF THE CASE

Petitioner John Wright Moore was charged with, and convicted of, hiring the arson of his cocktail lounge in Bakersfield, Kern County, California. The prosecution presented one Frank Martino, a convict, who claimed to have been paid $1,000 by petitioner to set the fire.

Under the state law of California, a conviction can not be obtained on the uncorroborated testimony of an accomplice to that crime; California Penal Code 1111; where a witness is an accomplice as a matter of law, the jury must be so instructed; *People v. Robinson*, 61 Cal 2d 373 (1964). The trial court failed to so brand Frank Martino, and the California Court of Appeals (A-25-A-31) recognizes this to be error. That error was measured under the *state* harmless error rule of *People v. Watson* (1956) 46 Cal 2d 818, 836; (Appendix A-29).

The People sought to corroborate the accomplice testimony of Frank Martino by calling one Bill Baier. Bill Baier testified that he, Baier, had gone to petitioner's Bakersfield home one day and petitioner had admitted to

Baier that petitioner had hired Frank Martino to burn the cocktail lounge.

A. Constitutional dimension error in disallowing petitioner's version of the conversation.

Petitioner testified in his own behalf. (A-13 through A-17). Petitioner wanted to testify to petitioner's version of the conversation between Baier and petitioner, but the Court disallowed it; the Court curtailed petitioner's testimony to a *mere denial* that the conversation contained an admission/confession to Baier that petitioner had hired Frank Martino to burn the bar.

In fact petitioner would have testified that the conversation occurred in the presence of one Daniel Palmer, a party accompanying Baier, and the conversation dealt ~~with~~ Baier's concern that Frank Martino would implicate Baier in Martino's crime of making and passing counterfeit cashier's checks unless Baier arranged bail for Martino, who was than an inmate in the county jail in Monterey County, California. Baier had with him an arrest report of Martino which he left at petitioner's home and which was later seized by police when they executed a search warrant on the home of petitioner.

This document, Defense Exhibit "I" at trial, was denied admission before the jury in parallel with the trial court's refusal to allow petitioner to testify to the content of the conversation. The California Court of Appeals admitted that the document, Defense "I", that was denied admission, would have *corroborated* petitioner's version of the conversation. ("Moore's version of events *was bolstered* by Defense Exhibit I. Although this document was

not admitted into evidence, Moore was permitted to testify it was a police report concerning Martino's arrest in Salinas, which the jury knew involved the check case"; Appendix A-48).

Thus, petitioner suffered from the dual ruling that he could not present his version of the key Baier-petitioner conversation, nor could he *bolster* his version by presentation of the document Defense "I", which dealt with the content of that conversation. California Evidence Code Section 356 and 1235 provides a basis for petitioner's constitutional right under the 6th Amendment to call himself as a witness to his version of the conversation. Evidence Code Section 356 provides in part:

> "Where part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the subject may be inquired into by an adverse party . . . "

Evidence Code Section 1235 states in relevant part:

> "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing . . . " (See Appendix A-45).

The California Court of Appeals, while cognitive of these rules, found the error harmless under the so-called "Watson test" of the Supreme Court of California, relying on a 1938 Court of Appeals decision that pre-dated the rule of *Chapman v. California* (1967) 386 U.S. 18, 24 *by thirty years*, and also relying on *People v. Watson* (1956) 46 Cal 2d 818, 836, a case pre-dating *Chapman* by a decade.

The California Court of Appeal simply asserted petitioner *"to be wrong"* in petitioner's assertion that such

error must be measured by the federal harmless error rule of *Chapman v. California*, 386 U.S. 18, 24 (1967). (Appendix A-44 through A-49). Such error, said the California Court of Appeals, "was not so egregious as to assume constitutional dimension." (A-48, A-49).

B. Constitutional dimension error in disallowing petitioner to show that key witness Bill Baier was biased against petitioner; *Delaware v. Van Arsdall* (1986) 475 U.S. 673.

Bill Baier was a key and necessary witness for the prosecution. Under the rule requiring corroboration of accomplice testimony, the conviction could not have been obtained without Baier's recitation of the alleged confession/admission.

Ipso facto, the credibility of *Baier* vis-a-vis the credibility of petitioner in petitioner's limited denial of such a confession/admission was critical in this case, and petitioner sought to show that *Baier* was biased against him because, inter alia, Baier had refused to cooperate with petitioner in defending a civil suit in tort in a non-related matter at petitioner's bar, "The Matchmaker".

In fact, Baier had cooperated with *opposing counsel* in the law suit. (Appendix A-50 through A-54). The impeachment of bias was attempted via witnesses Steven Schroller, an insurance claims investigator, and Calvin Stead, an attorney defending the lawsuit, who was representing petitioner. (Appendix A-50; A-54). The Superior Court cut off this attempt to impeach Bill Baier, claiming such impeachment "had absolutely nothing to do with" the case at bar. (Appendix A-54, A-55, A-56). The Court liberally laced the court-counsel colloquy before the jury

with his own comments for which the California Court of Appeals stated:

> "The challenged comments should undoubtedly been left unsaid", and "we can think of no good reason why a trial judge should flavor his or her evidentiary rulings with rhetorical comments such as those uttered here". (Appendix A-60 through A-64).

The affect of the comments, in general, was to tell the jury that the impeachment for bias evidence that had been adduced was irrelevant and inadmissible to show bias of Baier.

The trial Court refused to apply California Evidence Code 780 (Appendix A-57) which specifically codifies this right under the 6th Amendment to the U.S. Constitution. The California Court of Appeals refused to apply the federal harmless error rule of *Chapman v. California*, (1967) 386 U.S. 18, 24, as required by this Honorable Court in *Delaware v. Van Arsdall* (1986) 475 U.S. 673. It is unclear whether the California Court of Appeals fashioned and applied *any* harmless error analysis, merely commenting that reversal was "unwarranted" because *petitioner* failed to show that the prohibited information "might reasonably have produced a significantly different impression of (Baier's) credibility . . . "

Once again the California Court of Appeal chastised petitioner for petitioner's assertion that *Chapman v. California* (1967) 386 U.S. 18, 24 was the governing standard. (Appendix A-49). Cf. *Delaware v. Van Arsdall*, 475 U.S. 673, where such a standard was mandated by this Honorable Court.

It must be emphasized that the California Court of Appeals *shifted the burden to petitioner* to show that the failure to allow the impeaching evidence of bias of witness Baier "might reasonably have produced a significantly different impression of (Baier's) credibility", while the *Chapman* rule places the burden on the *prosecution* to show *beyond a reasonable doubt* that the error did not contribute to the verdict obtained. (Appendix A-57; A-60).

Prior to jury selection, California law, Code of Civil Procedure 232 (a), applied to criminal cases, *requires* that jurors shall be sworn to truthfully answer questions. This the Trial Court failed to do, and the California Court of Appeals (See Appendix A-17 through A-25) excused the error, even "*assuming* the stringent standard of harmless beyond a reasonable doubt applies. (See *Chapman v. California*, 386 U.S. 18, 24)".

This oblique reference to *Chapman* was the closest the California Court got to the multitude of Sixth Amendment errors in this case.

REASONS FOR GRANTING PETITION FOR CERTIORARI

1. To resolve the consequences of the error under the 6th Amendment of failing to insure that petitioner's jury panel in a criminal case was sworn to tell the truth prior to commencement of voir-dire.

2. To once again assert that error of constitutional dimension occurring in a state criminal trial under the 6th

Amendment must be measured by the federal harmless error rule of *Chapman v. California* (1967) 386 U.S. 18, 24.

3. To insure that state appellate courts reviewing a state criminal conviction do not shift the burden of proving error to the criminal defendant in error of federal/constitutional magnitude.

ARGUMENT I

THE PETITIONER WAS DENIED PROTECTION UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY BEING TRIED FOR CRIME BEFORE A JURY THAT HAD NOT ALL BEEN ENTIRELY SWORN TO TELL THE TRUTH BEFORE COMMENCEMENT OF VOIR-DIRE.

California procedural law recognizes the mandate requiring a prospective jury panel being sworn to tell the truth during questioning in the voir-dire selection process; California Code of Civil Procedure 232 (a); Appendix, A-18, A-19.

Petitioner suggests that this admitted error can not be subject to the harmless error rule of *Chapman v. California* (1967) 386 U.S. 18, 24 because it is impossible to ascertain on this record what answers to questions would have been forthcoming had the jurors been properly sworn.

The process at bar proceeded in 2 steps, interrogation in chambers during which no jurors were sworn, and a subsequent in open court interrogation where the oath was administered. Four of the non-sworn jurors ended on the 12 person jury. The California Court of Appeals

asserts inability of petitioner to attack this federal constitutional magnitude error because of failure of his trial counsel to object.

Petitioner asserts that such defalcation amounts to ineffective assistance of counsel and should not preclude review by this Honorable Court. It is the burden of the State of California to show that beyond a reasonable doubt this error in no way contributed to the conviction.

As is true about *all* of the 6th Amendment errors in this case (See Arguments II & III infra) the California Court of Appeals wrongly shifted the burden to prove harmful error to this petitioner. As to this jury selection error, the California Court of Appeals said:

> " . . . *Moore's* failure to establish prejudice – i.e., a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different – precludes reversal on this ground".

As to its passing and transient reference to the "harmless beyond reasonable doubt" rule of Chapman, the California Court noted that:

> "*Moore* also has not demonstrated that this result should change merely because the Court, not counsel, conducted voir dire after the oath was administered".

Therefore, as was its procedure at all stages, the California Court of Appeal wrongly shifted the burden of demonstrating beyond a reasonable doubt that the error did *not* contribute to the conviction, a burden to be borne by the prosecution under *Chapman v. California,* 386 U.S.

18, 24 (1967), to the shoulders of the petitioner, to explicitly demonstrate the affirmative prejudice. This the State of California can not do, and certiorari should be granted to insure that the burden remains with the prosecution, the beneficiary of a 6th Amendment protected error, to demonstrate that the error complained of did not contribute to the conviction. That burden is, of course, the standard of beyond a reasonable doubt. *Fahy v. Connecticut* (1963) 375 U.S. 85; *Chapman v. California* (1967) 386 U.S. 18, 24.

Certiorari should, therefore, be granted.

ARGUMENT II

THE COURT OF APPEALS OF CALIFORNIA REFUSED TO APPLY THE FEDERAL HARMLESS ERROR RULE OF *CHAPMAN V. CALIFORNIA* (1967) 386 U.S. 18, 24 AND, INDEED, CLAIMED IT NOT APPLICABLE, TO DENIAL OF THIS PETITIONER'S 6TH AMENDMENT RIGHT TO CALL A WITNESS IN HIS DEFENSE (HIMSELF) AND PRESENT PETITIONER'S REBUTTAL VERSION TO AN ALLEGED ADMISSION/CONFESSION OF PETITIONER PRESENTED BY A STATE WITNESS OF QUESTIONABLE CREDIBILITY. CERTIORARI MUST BE GRANTED TO REAFFIRM THAT THE CHAPMAN TEST GOVERNS ALL ERRORS OF CONSTITUTIONAL DIMENSION IN STATE CRIMINAL PROSECUTIONS INVOLVING THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION.

As noted supra in petitioner's *Statement of Facts*, petitioner sought to present his side of an alleged conversation between state witness Bill Baier and petitioner to rebut Baier's assertion that petitioner had admitted to Baier that petitioner had hired one Frank Martino to

commit arson in the burning of petitioner's bar, "The Matchmaker," in Bakersfield, California.

The Superior Judge denied petitioner the right to present this testimony, permitting petitioner to *only deny* that petitioner made such an admission/confession. Petitioner sought to present before the jury the full content of that conversation which would have been corroborated and supported by an item of physical evidence (Defense Exhibit I) left by Bill Baier at petitioner's home during the conversation.

The state was allowed to present the full conversation via Baier; of course, had a 3rd party witness overheard the conversation, petitioner surely could have called such a witness to testify to the content of the conversation to rebut Bill Baier.

While petitioner's version would arguably suffer from an allegation of bias, that goes to *weight* and not *admissibility*, and under the guarantee of the 6th Amendment to the U.S. Constitution, petitioner can call himself and fully present his version of the conversation. Denial of this right, as occurred in this trial, is error, and this error must be measured by the federal harmless error rule of *Chapman v. California,* (1967) 386 U.S. 18, 24:

> Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless.
>
> It is for that reason that the original common-law harmless error rule put the burden on the beneficiary of the error either to prove that there

> was no injury or suffer a reversal of his erroneously obtained judgment. There is little, if any, difference between our statement in *Fahy v. Connecticut* (375 U.S 85) about "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our Fahy case when we hold, as we do now, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt . . .

The California Court of Appeal labored long and laboriously to justify not reversing petitioner's conviction because of denial of allowing petitioner's rebuttal/impeachment version of the key conversation containing the alleged confession/admission, concluding "The testimony sought to be elicited by defense counsel was, *generally*, not irrelevant, and Moore was entitled to go beyond merely denying that the conversations concerned the burning of the bar" (Slip opinion, page A-45).

However, the California Court concluded that "assuming the Court erred, reversal is not warranted", citing the state evidence code, Section 354, which provides in part,

> "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the Court which passes upon the effect of the error or errors is of the opinion

> that the error or errors complained of resulted in a *miscarriage of justice . . . "*

The California Court then relied on a 1938 case, *People v. Crowl,* (1938) 28 Cal. App. 2d 299, 313-315, a case preceding the mandatory *Chapman* rule *by about 30 years,* to assert that the *"miscarriage of justice"* standard was the correct criteria. This standard, often called the "Watson Rule", was applied by the California Supreme Court in *People v. Watson* (1956), 46 Cal. 2d 818, 836:

> Giving due consideration to the varying language heretofore employed in relating the constitutional amendment to the particular situations involved, it appears that the test generally applicable may be stated as follows: That a "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. Phrasing the test in this language avoids any complexity which may be said to result from the language employed in the double negative approach, and such phrasing seems to coincide with the affirmative language used in the constitutional provision.

Watson, and its "miscarriage of justice" standard, preceded *Chapman v. California,* supra, by over a decade, and, of course, was deemed inappropriate, after the advent of Chapman, as to errors of constitutional dimension.

Indeed, it is noteworthy that *Chapman v. California*, itself, at 386 U.S. 18, 20, fn. 3 disapproved this very rule, appearing in the California State Constitution:

> "No judgment shall be set aside, or a new trial granted in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the Court shall be of the opinion that the error complained of has resulted in a *miscarriage of justice*".

In *Chapman v. California* this Honorable Court specifically rejected the California state harmless error rule and fashioned the Chapman rule to govern errors of constitutional dimension. Under the 6th Amendment, a criminal defendant has compulsory process to secure witnesses in his defense, and error in disallowing one of these witnesses to fully present key rebuttal testimony to an alleged confession/admission can not be measured by any rule except the Chapman test.

The California Court could only chastise petitioner in his embrace of *Chapman*, claiming the failure to "cite any authority", save the rule itself, branded petitioner as "wrong":

> Without citing any authority, Moore claims that because he was the defendant and a "competent and critical witness" error in excluding his testimony violated the Sixth Amendment and must be assessed under *Chapman v. California*, supra, 386 U.S. 18. He is wrong . . . (Appendix, A-48).

The California Court also admitted that "Moore's version of events *was bolstered* by Defense Exhibit I", and that Court acknowledged that this was the sole defense exhibit denied admission into evidence. While petitioner was "permitted to identify the subject of the police report", i.e., Exhibit I, the prosecutor and the court, in tandem, blocked the key exhibit which would have supported petitioner's version of the key conversation which the Court denied petitioner the right to present.

At this late date, the *Silver Anniversary* of *Chapman v. California* (1967), 386 U.S. 18, 24, it is both distressing and appalling that Courts of the very state giving birth to the Chapman case should still be unwilling to apply its mandate. Unquestionably, a "booster shot" is needed to the California Appellate Courts. This Court, of course, has continued to apply the Chapman test, and the panoply is vast.

In *Pope v. Illinois* (1987) 481 U.S. 497, 504, as to the failure to give a necessary jury instruction, a right under the 6th Amendment in a criminal trial, this Honorable Court said:

> "Although we plainly have the authority to decide whether, on the facts of a given case, a constitutional error was harmless under the standard of *Chapman v. California*, 386 U.S. 18 (1967), we do so sparingly. *Rose v. Clark*, supra, at 584. In this case the Illinois Appellate Court has not considered the harmless error issue. We therefore vacate its judgement and remand so that it may do so".

At bar, of course, the California Appellate Court "considered" the harmless error *vel non* of denial of allowing

petitioner to fully testify, but repeated the same error in the state treatment of the Chapman case – the use of the "miscarriage of justice" rule rather than the federal Chapman rule itself.

In *Rose v. Clark*, 478 U.S. 570 (1986) this Honorable Court again applied the Chapman rule to a jury instruction error assertedly in violation of *Sandstrom v. Montana* (1979) 442 U.S. 510.

In *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986), on the limitation of a defendant's right to cross-examine, this Honorable Court held:

> " . . . that the constitutionally, improper denial of a defendant's opportunity to impeach a witness for bias, like the Confrontation Clause errors, is subject to *Chapman* harmless-error analysis".

See also, *Harrington v. California* (1969) 395 U.S. 250 for application of *Chapman* to cumulative witnesses of the prosecution, some of whom the defendant was denied confrontation; See also *Schneble v. Florida* (1972) 405 U.S. 427. Other cases applying *Chapman* to errors of constitutional dimension are *United States v. Hasting*, 461 U.S. 499, 509 (1983):

> Since *Chapman*, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless . . .

Moore v. Illinois, 434 U.S. 220, 232 (1977):

> In view of the violation of petitioner's Sixth and Fourteenth Amendment right to counsel at the

> pretrial corporeal identification, and of the prosecution's exploitation at trial of evidence derived directly from that violation, we reverse the judgment of the Court of Appeals and remand for a determination of whether the failure to exclude that evidence was harmless constitutional error under *Chapman v. California*, 386 U.S. 18 (1967).

Recent federal trial and appellate court opinions have no trouble recognizing that the Chapman test is the appropriate rule; see, e.g., *Clark v. Moran*, 749 F. Supp. 1186, 1192-1193 (D.R.I. 1990); *Ouimette v. Moran*, 762 F. Supp. 468, 478-479 (D.R.I. 1991); *Fernandez v. Leonardo*, 742 F. Supp. 55, 63 (E.D.N.Y. 1990); *Lesko v. Lehman*, 925 F. 2d 1527, 1541 (3rd Cir. 1991); *Fleming v. Collins*, 917 F.2d 850, 855, and at fn. 6, where the 5th Circuit states: "The Supreme Court also has remained committed to *Chapman* over the years. See, e.g., *Satterwaite v. Texas*, 486 U.S. 249 (1988) (reversing a sentence of death because . . . "it was impossible to say beyond a reasonable doubt that (certain expert testimony) . . . did not influence the sentencing jury"); *Kordenbrock v. Scroggy*, 919 F. 2d 1091, 1097 (6th Cir. 1990); *Shearley v. Seabold*, 929 F. 2d 272, 273 (6th Cir. 1991); *United States v. Daniel*, 932 F.2d 517, 521 (6th Cir. 1991), citing this Court in *Arizona v. Fulminante*, 499 U.S. ___, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) which held, for the first time, that admission of a coerced confession is subject to harmless error analysis under *Chapman v. California*.

In view of the above, certiorari must and should be granted to the Court of Appeal, State of California, to insure that state appellate courts, even in unpublished opinions, reviewing state criminal convictions involving

constitutional dimension errors, properly apply the federal harmless error rule of *Chapman v. California* (1967), 386 U.S. 18, 24. See also *Smith v. United States*, ___ U.S. ___ (12-16-91) No. 90-7347, Dissent by Justices Blackmun, O'Connor, and Souter, especially the footnote, where it is provided:

> "The fact that the Court of Appeals opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the circuit and surely is as important to the parties concerned as is a published opinion."

ARGUMENT III

THE COURT OF APPEALS OF CALIFORNIA REFUSED TO APPLY THE FEDERAL HARMLESS ERROR RULE OF *CHAPMAN V. CALIFORNIA* (1967), 386 U.S. 18, 24, PROVIDED IN *DELAWARE V. VAN ARSDALL* (1986), 475 U.S. 673, TO THE TRIAL COURT'S DENIAL OF ALLOWING PETITIONER TO SHOW THE BIAS OF KEY PROSECUTION WITNESS BILL BAIER, AND IN FACT SHIFTED THE BURDEN TO PETITIONER TO SHOW THAT PETITIONER WAS HARMED BY THIS ERROR, A VIOLATION OF THE BURDEN RULE OF *CHAPMAN V. CALIFORNIA* (1967) 386 U.S. 18, 24.

Under California law, the State of California could not obtain a conviction against petitioner solely on the uncorroborated testimony of the admitted accomplice, Frank Martino; P.C. 1111. The state bridged this gap by presenting another convicted felon, Bill Baier, who claimed that he, Baier, was present at petitioner's

Bakersfield, California abode on a date uncertain and that petitioner admitted to him that he, petitioner, had hired Frank Martino to burn the cocktail lounge.

Petitioner testified in his own behalf, and was permitted to deny stating this to Bill Baier but was denied his constitutional right, and right under California Evidence Code Sections 356 and 1235, to testify to petitioner's version of the conversation.

Petitioner called witnesses, Steven Schroller, an insurance investigator, and Calvin Stead, a Civil Defense Attorney, to testify to Bill Baier's refusal to cooperate in the defense of a civil suit brought against petitioner for an unrelated civil tort occurring at the "Matchmaker", petitioner's cocktail lounge, at a prior time.

Bill Baier was a percipient witness to these events, and, in fact, cooperated with counsel for the plaintiff. Petitioner sought to show that this behavior on the part of Bill Baier demonstrated bias against petitioner, and thus affected Baier's credibility.

Plainly, the credibility of Bill Baier in this trial, vis-a-vis the credibility of petitioner, was a key resolution for the jury. (Appendix A-49 through A-56). California Evidence Code 780 (Appendix A-57) and the Sixth Amendment to the Constitution both permit this evidence of bias; it is *admissible*, and its *weight* is for resolution by the jury.

The Superior Court readily blocked the attempt to show bias with equal rapidity to its refusal to allow evidence from petitioner on petitioner's version of the

conversation with Baier. (Appendix A-52 through A-54; A-55, A-56).

The California Court of Appeals embraced this ruling, which violates the standard of *Delaware v. Van Arsdall* (1986), 475 U.S. 673, by shifting the burden, contrary to *Chapman v. California* (1967), 386 U.S. 18, 24, to the shoulders of petitioner.

That Court held that even if Moore is correct (in asserting error in disallowance of the evidence on bias, which affected the credibility of Baier), "reversal is unwarranted, because *Moore* has failed to show the prohibited information might reasonably have produced a 'significantly different impression of (Baier's) credibility . . . ' ". (Appendix A-59).

While noting a California Supreme Court case discussing *Delaware v. Van Arsdall* (1986), 475 U.S. 673, the California Court of Appeals refused to admit/acknowledge that the error must be governed by *Chapman v. California,* 386 U.S. 18, 24.

Delaware v. Van Arsdall clearly holds at 684 of 475 U.S. 673:

> "Accordingly, *we hold* that the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other confrontation clause errors, is subject to *Chapman* harmless error analysis . . . "

This Honorable Court held that factors which could be considered under the rule of Chapman were:

(a) importance of the witnesses' testimony in the prosecution's case;

(b) whether the testimony was cumulative;

(c) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points;

(d) the extent of cross-examination otherwise permitted; and

(e) the overall strength of the prosecution's case. (475 U.S. 673, 684).

A consideration of each of these elements, in sequence, leaves no doubt that the error can not be deemed harmless under *Chapman*, supra.

1. As to (a), Bill Baier was the most important witness called by the prosecution, because under California Penal Code 1111, the testimony of convicted felon Frank Martino, an accomplice as a matter of law, was legally insufficient to achieve a conviction;

2. As to (b), the testimony of Baier was not only *not cumulative*, but there was *no other* corroboration;

3. As to (c), there was *no other* evidence corroborating Bill Baier;

4. As to (d), it is clear that the Superior Court curtailed the impeaching testimony; and erroneously commented against it (See Appendix A-60)

5. The strength of the prosecution's case was presented only via the 2 convicted felons, Frank Martino and Bill Baier; no physical evidence linked petitioner to the crime.

Therefore disallowance of the impeachment of Bill Baier, both for bias, and on the merits of his assertion that petitioner had made admissions to him, can not sustain the scrutiny of the test of *Chapman v. California,* 386 U.S. 18, 24. The only problem is the California Courts do not recognize and accept their obligation to measure error of constitutional dimension by the Chapman rule.

Therefore, certiorari must be granted, the error again analyzed, as this Court has done in a multiplicity of cases, and the cause remanded to the California Court of Appeals to properly apply the Chapman rule. As this Honorable Court concluded in *Delaware v. Van Arsdall,* (1986) 475 U.S. 673, 684:

> "We believe that the determination whether the Confrontation Clause error in this case was harmless beyond a reasonable doubt is best left to the Delaware Supreme Court in the first instance. Accordingly, that court's judgment is vacated, and the case is remanded for further proceedings not inconsistent with this opinion."

CONCLUSION

To resolve serious and national scope issues in Sixth Amendment protection, raised in this petition, Certiorari to the Court of Appeals of the State of California should be granted.

Dated: April 15, 1992 at Santa Ana, California.

Respectfully submitted,

ROGER S. HANSON
Member of the Bar
United States Supreme Court
Counsel for Petitioner

APPENDIX A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOHN MOORE, Defendant and Appellant.	F014712 (Super. Ct. No. 41993) OPINION (Filed Nov. 22, 1991)

APPEAL from a judgment of the Superior Court of Kern County. John M. Nairn, Judge.

Roger S. Hanson for Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Robert R. Anderson, Acting Senior Assistant Attorney General, Edmund D. McMurray and Judy Kaida, Deputy Attorneys General, for Plaintiff and Respondent.

STATEMENT OF THE CASE

On May 2, 1990, an information was filed in Kern County Superior Court action no. 41993, charging John Wright Moore with arson of a structure (Pen. Code, § 451, subd. (c); count 1),[1] arson of property § 451, subd. (d);

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[1] All statutory references are to the Penal Code unless otherwise indicated.

count 2), and insurance fraud (§ 548; count 3). Moore pleaded not guilty.

Count 3 was eventually dismissed upon the People's motion. Following a jury trial, Moore was convicted on counts 1 and 2. His motion for new trial was denied, and he was sentenced to four years in prison and ordered to pay various fines, assessments, and costs. Notice of appeal was timely filed.

STATEMENT OF FACTS

I. People's Case[2]

Martino's Testimony

At the time of trial, Frank Martino – also known as Frank Picciallo – was in custody for burning the Matchmaker bar. He had previously been employed at the Matchmaker, having been hired by Moore in April 1989. He worked there until the end of September, when he was fired by Bill Baier.

Martino was rehired on October 10 or 11. Moore told him Baier was in the hospital, and asked Martino to fill in for the rest of the week until the new owners of the bar took over the following Monday. Martino was to act as bartender and doorman. Moore gave him the keys to the bar the second or third night Martino was at work.

On the morning of Friday, October 13, Martino went to the bar's back office, where Moore was present. Moore

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[2] Given the issues presented on appeal, emphasis will be placed on the testimony of Bill Baier and Frank Martino (the prosecution's main witnesses), and on Moore's own testimony.

asked if Martino had ever "torched" anything. When Martino replied affirmatively, Moore asked if he was interested in "torching" something. Martino told Moore to take him to the person who wanted it done. After the two got into Moore's car, Moore said he wanted the Matchmaker burned. Martino asked if Moore would rather burn it down than sell it, and Moore agreed with him. Moore offered to pay Martino $1,000--$500 the morning after the fire, and the balance around the first of the month. Moore said he would get $60,000 in insurance proceeds.

Moore and Martino drove to a store in Bakersfield, where Moore purchased paint thinner in a white one-gallon jug. According to Moore, paint thinner was not detectable. They then drove to a cotton field, where Moore demonstrated that the paint thinner would not explode.

Moore told Martino the bar's sprinkler system was off. When Martino asked about the burglar alarm, Moore said it did not work because the batteries were dead. After the two men returned to the bar, Moore indicated where the paint thinner should be poured. He told Martino to pull down ceiling tiles so the fire would involve the roof. Moore also demonstrated that the burglar alarm was not working.

Martino worked as bartender on Friday night. He closed the bar at 1:30 or 1:45 a.m. on Saturday and went home. He returned about 2:30 or 2:45 a.m. and parked in back. He went to the front door, turned the key in the burglar alarm to the "off" position, let himself in, and got the paint thinner, which he proceeded to spread around

inside the premises. He also popped out some ceiling tiles. In accordance with Moore's instructions, Martino started one fire by the pool table. He attempted to set another fire near the front door, but it would not ignite. Martino then put the paint thinner container and some gloves in a box. He placed the box and its contents near the liquor cabinet. He then left the building by running through the back door so it would appear as if the door had been ripped open. As he left, he noticed the sprinkler valve was in the "shut" position.

The Matchmaker burned down early Saturday, October 14. Later that morning, Moore paid Martino $500 in cash. Although Moore gave statements to fire investigators during the next few days, he did not admit his involvement in the incident. Moore paid Martino another $200 in cash on October 31.

On November 8 or 9, Martino and Dan Palmer were arrested in Monterey County for passing Wells Fargo business checks, a scheme in which they were both involved. Martino was personally unable to post bail and was held in custody in Salinas. Since neither his mother nor his brother had the money to do so, he telephoned Moore for help. Moore told him to go to court and get a bail reduction. Martino made several collect telephone calls to Moore, all of which Moore accepted.

While he was in jail in Monterey County, Martino telephoned Lieutenant Dunlap of the New Jersey state police, who contacted Captain Casey.[3] Casey then

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[3] Dunlap and Casey, an arson investigator with the Bakersfield Fire Department, had previously spoken on October

(Continued on following page)

contacted Martino. Martino initially declined to speak with Casey; however, he later telephoned Casey and asked him to come to Salinas. Casey went to see Martino a few days later.

Martino was facing nine years on the Kern County charges, and he told Casey he would be "real pissed" if Casey could not work out a deal with the Kern County District Attorney's Office. Martino felt he should receive some consideration if he gave a statement and testified. Casey said he could not recommend Martino not be prosecuted, as that was up to the district attorney's office. Martino told Casey he could probably assist Casey in securing corroborating information, but Martino never followed up because Casey said it would not be necessary. Martino then told Casey the details about the Matchmaker fire.

Martino was released from jail that night. The next day he traveled by bus to Bakersfield. Baier provided transportation for his subsequent court appearances in Monterey County. Sometime in November, after his release in Monterey County but before his arrest in Bakersfield, Martino told Baier of his involvement in the fire.

(Continued from previous page)

17, when Martino first gave a statement to Casey. When Casey was unable to verify Martino's identity, Martino contacted Dunlap. Martino had been an unindicted coconspirator in a New Jersey case involving a Mafia homicide. Martino was not the killer, but cooperated with the state police. As a result, he was relocated to Bakersfield and given a new identity as part of a New Jersey witness program.

On November 28, Martino was arrested in Bakersfield. Martino telephoned his mother, who contacted Moore. Martino then called the bail bondsman, who said Martino was being taken care of. Martino was released the same day. The bail bondsman, Bob Melendez, took Martino to Moore's residence.

Martino spent the night at Moore's house. Moore said Martino owed him money now, and that Martino was either going to have to pay Moore or the bail bondsman. Moore said he had talked with his attorney, who advised Moore to get Martino "out of there." The next day, Moore and Martino visited Moore's attorney, Mr. Lorenz. Martino did not tell Lorenz about his involvement in the fire, and Lorenz subsequently refused to take the case.

Martino's next Bakersfield court appearance was scheduled for December 15. The Monterey County proceedings were ongoing during this time. Martino did not make the December 15 appearance; he absconded in both cases and went to Florida. He was subsequently captured there.

Martino eventually pled guilty in both Monterey and Kern Counties. He agreed to felony probation in the Monterey County case. The plea was not conditioned on his giving testimony in the Kern County case. In this action, Martino pled guilty to burning the Matchmaker bar, a felony, pursuant to a plea bargain under which he would be sentenced to one year in county jail and five years of felony probation, to run concurrently with the sentence imposed in the Monterey County case. Martino also agreed to testify in all hearings in the case of People versus John Moore. In addition, Martino pled guilty in

New Jersey to a felony burglary charge. His exposure in that case was 364 days in county jail, to be run concurrently with the sentences in the other two cases.

Each jurisdiction made a separate plea bargain offer. Martino was only concerned with receiving concurrent sentences in the three actions. Only the Kern County plea included a requirement Martino testify. There was no connection between the Monterey case and Martino's plea or testimony in the Kern County case. Martino expected to be in custody until around Christmas, and was not prosecuted for fleeing either jurisdiction.

Martino last saw Moore sometime between November 28, when he posted bail, and December 7, when he left Kern County. Martino never received a threat from Moore. Baier and Dan Palmer visited Martino's house on December 7; Palmer had transcripts of statements Martino had given in Monterey County. Palmer had told Baier that Martino was trying to find someone to kill Baier.[4] The two of them advised Martino to withdraw the statement in Monterey County so Palmer would not be prosecuted. They threatened to check public records to determine if Martino had given a statement against Moore and, if so, to tell Moore. Martino left town the same day. This was the last time Martino spoke with Baier.

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[4] In early December, Martino discovered that "people were talking." He wanted to find out who was saying what. The main reason he made the threat was to find out if Palmer was talking to Baier. Martino never tried to hire anyone to kill Baier; he merely asked Palmer if Palmer knew somebody, in order to determine who was allied with whom.

Baier's Testimony

In October 1989, William Baier was the manager and bartender of the Matchmaker. Moore, who owned the business, was his boss. Until March 1990, Baier and Moore were close friends and met socially. Baier also became friends with Frank Martino after the latter was hired. Martino told Baier he had been a member of the Italian Mafia and his real name was Frank Picciallo. Baier and Moore were present a number of times when Martino spoke about his past.

By October 1989, business at the Matchmaker was slumping. Baier attributed this condition to the Bakersfield Police Department's practice of "setting outside the door,"[5] trouble finding a good band, and the fact a woman had been killed at the bar in July. Baier was aware Moore had a federal suit pending against the Chief of Police and the City of Bakersfield regarding a zoning problem. As of the time of trial, Baier expected to be a witness for Moore in one of the lawsuits. In Baier's opinion, the police department was harassing Moore.

In August or September, Moore casually remarked he ought to burn the bar because it was not making any money. On September 15 or 16, Baier learned that Bob King had purchased the bar and intended to take over on October 16.

On Saturday, October 14, 1989, Baier learned the Matchmaker had burned down. He had gone to Fresno

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[5] Moore had filed suit against the city based upon this conduct.

the previous Tuesday; on Wednesday he was unexpectedly hospitalized with high blood pressure and kidney problems. He became ill because he had stopped taking his medication about six months earlier. He could not have made himself sick within a day or two after he stopped taking the medicine.

Moore was released from the hospital Friday afternoon. He was scheduled to work that night, but Moore told him Martino would cover Baier's shift. Martino was not then employed at the Matchmaker. He had been hired in early 1989, then fired in September. Baier fired him at Moore's request. Martino was not pleased the bar was being sold, leaving him without a job, "so he just got a negative attitude." When Martino asked why he was being fired, Baier relayed Moore's feelings about his attitude. Martino expressed disgust.

At the time of the fire, Moore, Baier, Martino, and bar employee Laura Kratz possessed keys to the Matchmaker. After the fire, Baier and Martino talked about Moore being a logical suspect.

Around the middle of November 1989, after speaking with Martino, Baier confronted Moore about the fire. The conversation took place in back of Moore's residence because Moore did not want to be overheard. Baier told Moore that Martino said he (Martino) burned the bar and had been paid by Moore to do it. Baier asked Moore if this was true; Moore said "yeah" and admitted paying Martino $1,000.

By this time, Martino had been arrested in Monterey County. Moore had previously refused to post bail for Martino. During the November conversation, however,

Moore told Baier he had given money to Martino's mother for Martino's bail. In that way, Moore's name would not be on the bail slip. Moore wanted to know if Martino had told anyone else about the fire, and Baier said that as far as he knew, he (Baier) was the only one. Moore told Baier to tell Martino that if Moore went to jail, Moore would not make bail until Martino was "in the ground."

Baier relayed this message to Martino around Thanksgiving. Baier did not believe he was threatening a witness; he was simply delivering a message. Martino said he didn't like the idea. At about this time, Martino posted bail in the arson case and wanted to flee the jurisdiction. He asked Baier to drive him out of state, but Baier refused. Martino never asked Baier to corroborate his testimony in this case.

Baier's friendship with Martino ended on December 7, 1989, when Dan Palmer told Baier that Martino wanted him (Baier) killed. Martino said Baier knew too much. While Baier knew about the Monterey County check case and charges pending against Martino "back east," Baier was not involved in any of Martino's criminal activities.

Because no one confronted him about the fire and because of his friendship with Moore, Baier did not speak with investigators until the middle of March 1990. He then was interviewed by Tam Hodgson of the district attorney's office. Hodgson told Baier that as long as Baier was truthful with him, Baier would not be arrested for anything. However, if Baier did not tell Hodgson what he (Baier) knew, Baier could possibly be prosecuted for being an accessory after the fact. Baier was on felony

probation at the time. Hodgson said there was no reason for Baier's probation to be revoked.[6]

Baier was on felony probation at all relevant times. He never told his probation officer about transporting Martino to and from Monterey County or about the information he had concerning the Matchmaker fire. He may have once told someone something to the effect that he would do anything to avoid being put in jail again.

Other Evidence

The parties stipulated the Matchmaker fire was caused by arson. Captain Casey determined the fire originated near the pool table. He found indications an accelerant had been used. In addition, Casey found a melted, white, one-gallon plastic jug in front of the liquor cabinet with the deepest burn. The label stated the jug contained paint thinner. Casey could smell paint thinner in the area. The condition of the lid indicated the jug had melted while inside a cardboard box that Casey found on the floor.

When Martino telephoned Casey on November 10 from the Monterey County jail, Casey asked what substance was used to start the fire. Martino said paint thinner. This fact had not been made public.

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[6] Hodgson confirmed interviewing Baier on March 13. He did not threaten to arrest or prosecute Baier, or to have his probation violated if he did not cooperate. He told Baier that if Baier had done nothing wrong, he could not be charged with any crime.

Casey interviewed Martino on November 13. Martino asked Casey to try to persuade the district attorney not to prosecute. Casey said he was not in a position to do so, and could make no representations about what the district attorney would do, although he promised to talk to the district attorney about the case. Martino waived his constitutional rights and gave Casey a statement concerning his and Moore's involvement in the fire. The physical evidence from Casey's investigation was consistent with Martino's description of how he poured the paint thinner. Martino said he asked Moore why he wanted the bar burned when it had already been sold, and Moore replied he was "just tired of messing with it."

Martino told Casey that Moore said he would receive $60,000 in insurance proceeds for the bar's contents, plus $30,000 for loss of wages, for a total of $90,000. During an earlier conversation Casey had with Moore, Moore said the bar had been sold to King for $75,000.[7]

Based on the information Casey possessed at the time, had Martino not come forward, Casey would not have been able to identify who set the fire.

Robert King entered into negotiations with Moore in August 1989 regarding the Matchmaker. An agreement was reached whereby King would purchase the bar for $96,000. King subsequently approached Moore about changing the agreement; King was "cash heavy" and asked Moore to take $75,000 cash. Moore wanted a 30-day escrow, but accepted the new offer. One of the terms of

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[7] Insurance records showed that Moore did receive a total of $90,000 for the loss of the Matchmaker.

the sale was that Moore would produce for King a new five-year lease on the building. Although escrow was to close on or before October 30, time was up, as far as King was concerned, on October 15. If he did not have the new five-year lease by that date, he would not allow escrow to close. About a week before the fire, King told Moore that he had to have the five-year lease or the sale would not close.

Dr. Ajalat owned the building in which the Matchmaker bar was located. Moore's lease was in force until April 30, 1990. Sometime in 1989, Moore asked Ajalat to transfer the lease to King. About a month before the fire, Ajalat agreed to a five-year lease extension in Moore's name, but told Moore he would not enter into a new lease with King. Ajalat was willing to transfer the extension to King, but this would not release Moore from liability under the lease. Perhaps a week before the fire, Moore told Ajalat King might back out of the sale without his own five-year lease.

Ajalat sent Moore a lease extension dated October 3, 1989; however, neither King nor Moore signed it. According to King, this document would have satisfied his requirements because it tied up the property for five years at a specific rental rate.

II. Defense Case

Moore's Testimony

Moore, who had no prior criminal convictions, had owned the Matchmaker for 15 years. He had known Martino since hiring him in April 1989. He did not run a

background check on Martino and, until the time of the fire, did not know anything about his criminal activities or connection with the Mafia. Moore had known Baier for approximately five years. Baier and Martino were very close friends. Moore's relationship with Martino was merely one of employer-employee.

On October 13, Moore was at the bar by 10 a.m. in order to open up. Laura Kratz was the only employee there when he arrived. Kratz and Martino both had keys to the front door, the office door, the service bar, and the burglar alarm, while Baier had access to the entire bar.

On October 13, Moore followed his normal routine and went home around 11:30 or noon. He denied approaching Martino and asking him to burn down the bar, or having anything to do with Martino that day. He never told Martino he would rather burn the place than sell it. They did not go to a store or a cotton field, nor did they have any conversation about using paint thinner to burn the bar. Moore did not see Martino that day until between 8:30 and 9:00 p.m., when Moore returned to the bar. Martino was tending bar; he and Moore did not have any private conversations.

On Friday afternoon, October 13, Moore received in the mail the lease extension from Ajalat. Moore knew King was out of town until Monday, so he decided to wait until Monday to have the document signed.

Moore learned about the fire at approximately 4 a.m., when he received a telephone call from the fire department. He spoke with Casey then, and again a day or two later. At the time, Moore had no information suggesting Martino was the arsonist.

Moore carried insurance on the Matchmaker: $60,000 on the contents and $30,000 for loss of business. His insurance had been at the same level for quite awhile. He estimated it would cost $100,000 to replace the bar's contents, so he lost about $40,000 as a result of the fire.

Moore's first conversation with Baier, after the fire, occurred when Martino was arrested. Baier telephoned Moore from Salinas and said they had to get Martino out of jail. Moore asked why Martino was in custody; Baier said it was something about counterfeit cashiers' checks. Moore refused to help. Martino also telephoned Moore, and Moore told him he would not post bail. Moore spoke with Martino two or three times when Martino called from the Monterey County jail; he did not know how many times his wife talked with Martino or how many times Martino called the house. Moore's telephone bill showed he received seven collect calls from Salinas that month. He did not post bail for Martino.

In the latter part of November, after Thanksgiving, Baier was at Moore's house. Moore's family was present as well; Moore had no private conversations with Baier. Baier said he had received a telephone call from Martino, who needed a ride. The subject of the conversation had nothing to do with arson.

During the last part of November, Baier came to Moore's house and said he was attempting to get Martino out of town. Moore did not know whether Baier's efforts had to do with the fire or the checks. Moore offered no money or other assistance.

On November 29, Moore took Martino to see attorney Lorenz. Martino had telephoned Moore and said he

needed a ride to see an attorney. Moore considered Lorenz a good attorney, so he took Martino to him. Moore was aware Martino had just been released from jail after being charged with burning the Matchmaker. At that point, Moore still thought someone else had burned the bar. Martino said he was being falsely accused, and Moore did not know what to believe. Moore took Martino to another attorney in addition to Lorenz, then gave him a ride to Cowboy Bail Bonds.[8]

Around December 1, Baier and Dan Palmer came to Moore's house. They spoke briefly – five or six minutes at the most. The subject of the conversation was not the arson fire, but other criminal matters involving those two individuals. Baier presented Moore with a police report pertaining to Martino's arrest in Monterey County.

Moore never had a conversation with Baier in which he admitted paying Martino $1,000 to burn down the bar. He did not talk to Baier at any time about wanting to burn the bar. He never asked Baier to relay a threat to Martino. Baier once told Moore that Martino was trying to hire someone to kill him (Baier), but Moore told Baier he did not want to get mixed up in any of Baier's dealings with Martino.

Moore did not pay Martino $500 cash the morning after the fire, although Martino and the other bar employees were issued their final paychecks subsequent

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[8] Moore initially denied taking Martino to see the bondsman. Only after a prosecution rebuttal witness testified to seeing them at Cowboy Bail Bonds did Moore recall he had been there with Martino.

to the fire. Martino never spent the night at Moore's house, nor did Moore ever tell Melendez, who worked for Cowboy Bail Bonds, to post bail for Martino or that Moore would be responsible for the bail. At the time Martino was bailed out of jail, Moore did not know Melendez. Moore saw Melendez once, in March 1990, when Moore himself was in the process of obtaining bail. Moore and Martino both posted bail through Cowboy Bail Bonds. Moore had known the owner for several years.

Moore last saw Baier at a party on March 9. They just said "hello." Baier telephoned Moore on March 13; the conversation principally concerned Baier's fear of going to jail. Moore was aware of Baier's felony probation status; they had conversations in the fall of 1989 about the topic. Moore was arrested on March 14.

Moore received a money settlement from his lawsuits against the City of Bakersfield. Baier appeared for a deposition in those cases. He was not a witness for Moore in the wrongful death case which arose out of the shooting at the bar.

Other Evidence

Wendy Moore, Moore's wife of 11 years, denied that Martino ever spent the night at her house. She and Moore never socialized with Baier or Martino. In October 1989, the Moores' financial condition was good.

When Martino was in jail in Monterey County, he called the Moore house a couple of times. Ms. Moore

accepted the calls and gave the telephone to Moore. She overheard Moore refuse to bail Martino out of jail.

According to bail agent Robert Melendez, Martino's mother guaranteed Martino's appearance and payment of bail in November 1989. She was also the guarantor when Martino was bailed out of jail in the instant case. Melendez had never met Moore.

When Melendez obtained Martino's release in the arson case, Martino said something to the effect that he was having problems with his boss and that he got "pissed off" so he "burned the fucking joint." Melendez did not give Martino a ride to Moore's house.

Baier worked for Mary Lytell, owner of the Executive Lounge, during late 1989 and early 1990. Near to the end of November 1989, Martino asked to work for Lytell. Baier told her not to hire Martino because he was the one who burned down Moore's bar, and he did it because he was mad at Moore about being fired. Baier also said Martino was a known arsonist, and that he was the one who set "all those fires" in northern California.

DISCUSSION

I. Failure to Swear Prospective Jurors

Moore contends the trial court erred by failing to swear prospective jurors prior to a session of voir dire held in chambers. Four persons so examined eventually became members of the trial jury. The error, Moore claims, is of constitutional dimension.

Due to pretrial publicity about this case, defense counsel moved for extended voir dire. The court agreed

to ask the prospective jurors in general if they had knowledge of this particular case; any persons affirmatively responding would then be examined individually in chambers.

Following the noon recess, proceedings were held in chambers. Neither the reporter's transcript nor the minute order reflects what occurred immediately after court reconvened, although it is clear no prospective jurors were sent to the courtroom prior to the noon recess. Obviously, proceedings to determine which prospective jurors needed to be examined in chambers must have taken place.

A number of prospective jurors were questioned in chambers. When impanelment proceedings resumed in open court, all prospective jurors were sworn. The court then conducted the standard voir dire. Of the prospective jurors examined in chambers, four – Kathleen Mickey, Mardi Poore, Velma Cook, and Billy Fringer – were ultimately seated as jurors.

Section 1046 provides that trial juries for criminal actions are to be formed in the same manner as juries in civil actions. Code of Civil Procedure section 232, subdivision (a) provides:

> "Prior to the examination of prospective trial jurors in the panel assigned for voir dire, the following perjury acknowledgement and agreement shall be obtained from the panel, which shall be acknowledged by the prospective jurors with the statement 'I do':
>
> " 'Do you, and each of you, understand and agree that you will accurately and truthfully answer, under penalty of perjury, all questions

> propounded to you concerning your qualifications and competency to serve as a trial juror in the matter pending before this court; and that failure to do so may subject you to criminal prosecution.' "

It is clear the statutory command was not complied with here. Although, as noted, there are gaps in the record – specifically regarding what took place prior to in-chambers voir dire – the record affirmatively reflects the panel of prospects was sworn *after* the limited in-chambers questioning. In addition, the transcript of the in-chambers session appears complete; it confirms no oath was administered at that time. It seems unlikely that, had the prospective jurors been sworn prior to being questioned in chambers, they would have been resworn when they returned to open court.

Despite the error, for a number of reasons we see no need to reverse the judgment. First, Moore waived the objection for purposes of appeal. In *Estate of Da Roza* (1947) 82 Cal.App.2d 550, the appellant contended the trial court should not have considered the testimony of two witnesses not shown by the record to have been sworn. (*Id.* at p. 555.) In rejecting this argument, the Court of Appeal held the appellant's failure to object at trial to testimony from the two witnesses waived any subsequent claim their testimony was incompetent. (*Id.* at pp. 555-556.) After discussing the rule that such an objection must be made during trial – while the defect is capable of being remedied – the court explained:

> "The foregoing rule appears to be reasonable. Otherwise a litigant who is present at a trial and has full knowledge of an inadvertent

> omission to swear a witness would be enabled to remain silent and speculate on receiving a favorable judgment or verdict, failing which, he might upset the entire proceeding by either a motion for new trial or an objection on that ground for the first time on appeal. The gist of the reason for the foregoing rule is that the court and adverse litigants are entitled to notice of the omission while there is still an opportunity to correct the oversight in procedure." (*Da Roza, supra,* at p. 556.)
>
> The same rationale and result apply here.

Second, even assuming the objection was preserved, the error does not require reversal without regard to actual prejudice. (See *People v. Bittaker* (1989) 48 Cal.3d 1046, 1085-1087.) The basic trial process was not aborted or denied altogether. (See *Rose v. Clark* (1986) 478 U.S. 570, 578 and fn. 6 ["Harmless-error analysis thus presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury"].) On the record before us, there is no basis upon which to conclude the jury as ultimately selected was not impartial. (Compare *Tumey v. Ohio* (1927) 273 U.S. 510 [judge received compensation if accused was convicted].) Accordingly, the error is not reversible per se.

Moreover, even if we assume the stringent standard of harmless beyond a reasonable doubt applies (see *Chapman v. California* (1967) 386 U.S. 18, 24), the record still does not justify reversal. The in-chambers questioning of the four challenged jurors was succeeded by a sworn in-court examination. In chambers, the prospective jurors

were questioned about their knowledge of the Matchmaker fire. Kathleen Mickey stated she did not remember much about it; she "[p]robably, yes" felt she could be a fair juror; and she thought she could decide the case solely on the evidence presented in the courtroom. She had no predisposition as to what the evidence might be, based on what she had heard.

Mardi Poore stated she was the personnel director for a law firm which did a significant amount of insurance defense work. She felt she would be qualified as a juror and would decide the case solely on the evidence presented in court. She had been to the Matchmaker once, perhaps 15 years ago. She knew a Mr. Stead, who worked in her office, and saw him on a daily basis. When defense counsel stated he thought her firm represented Moore until a short time before trial, Poore said she was not familiar with that or the file. When asked if she would have any difficulty in assessing Mr. Stead's testimony if he were called as a witness, she replied she did not know how to answer the question, but did not think it would. In terms of her firm's insurance company clients, Poore said she would have no problem if she learned that one of the insurance companies involved in the case was a law firm client.

Velma Cook stated she recalled reading about the fire, and that Moore was accused of either setting it or having someone set it. She felt she could be a fair juror and could try the case solely on the evidence presented in court. She would not compare the evidence she heard in court with what she heard on the news.

Billy Fringer was familiar with a news story about the fire, but did not recall any details. He felt he could try the case solely on the evidence received in court.

In open court, after administering the oath required by Code of Civil Procedure section 232, subdivision (a), the court emphasized it was concerned with getting 12 fair and impartial trial jurors who would decide the case solely on the evidence presented in court and the instructions given at the end of trial. The court then conducted voir dire.

Ms. Cook was questioned on various matters and stated she knew the Matchmaker's location. She did not respond when the court asked if anyone had a quarrel with the prosecution's burden of proof or the defendant's presumption of innocence. She had no quarrel with the rule that she must follow the law as instructed by the court. She did not respond when the court asked, "Do any of you know of any reason as you sit there now why you can't be fair and impartial and wait until both sides have presented all their evidence and you've been instructed on the law which applies to this case before you make up your mind, then giving both the People and the defendant a fair trial?"

Ms. Mickey reiterated that she had heard some of the facts of the case before coming to court, but said she could put those out of her mind and try the case solely on the evidence received in court. She had no quarrel with the basic system of criminal law, and knew of no reason why she could not be fair and impartial.

Ms. Poore stated she did not know Moore or either of the attorneys. As for the facts of the case, she had only

heard of the fire. She had been to the Matchmaker. She did not have any problem with the basic system of criminal law, and would not ask anyone at her law firm. She stated she would decide the case solely on the evidence presented in court and the instructions as given by the court, and she knew of no reason why she could not be fair and impartial.

Mr. Fringer stated he had heard "[o]nly the original stories" about the case, but nothing that would disqualify him as a juror. He was familiar with the area of the Matchmaker bar. He had no dispute with the basic system of criminal law, and would follow the law as stated by the court. He knew of no reason why he could not be fair and impartial.

Thus, despite giving unsworn in-chambers testimony, the four jurors were each subsequently questioned under oath about their ability to be fair and impartial to both sides in the case. During voir dire in open court, each confirmed that he or she could be fair and impartial. We are thus confident the failure to swear the four jurors before the limited in-chambers session was harmless beyond a reasonable doubt.

Moore also has not demonstrated that this result should change merely because the court, not counsel, conducted voir dire after the oath was administered. Moore notes in passing that only in chambers did he, through counsel, participate in voir dire. Code of Civil Procedure section 223, which was added by initiative measure (Prop. 115) approved June 5, 1990, provides that in criminal cases, "the court shall conduct the examination of prospective jurors," subject to certain exceptions.

As Moore has not challenged the validity of this statute, we must assume the court properly conducted voir dire.

Alternatively, Moore contends defense counsel was ineffective for failing to ensure the prospective jurors were sworn. Moore's failure to establish prejudice – i.e., a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different – precludes reversal on this ground. (*People v. Babbitt* (1988) 45 Cal.3d 660, 707; *People v. Heishman* (1988) 45 Cal.3d 147, 175; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218; *People v. Fosselman* (1983) 33 Cal.3d 572, 584; see *Strickland v. Washington* (1984) 466 U.S. 668, 687-696; *People v. Pope* (1979) 23 Cal.3d 412, 425-426.)

II. Error in Accomplice Instructions

Moore challenges the trial court's failure to instruct that Frank Martino was an accomplice as a matter of law, and its instruction that as a matter of law Bill Baier was *not* an accomplice.

A. Instructions Given

The court instructed the jury in the language of CALJIC No. 3.10 (5th ed. 1988 bound vol.),[9] to wit: "An accomplice is a person who is subject to prosecution for the identical offense charged in Counts 1 and 2 against the defendant on trial by reason of aiding and abetting."

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[9] All CALJIC instructions referred to are from the fifth edition unless otherwise noted.

It followed with CALJIC Nos. 3.11 (1990 rev.) (5th ed. pocket pt.) (testimony of accomplice must be corroborated), 3.12 (sufficiency of evidence to corroborate an accomplice), 3.13 (one accomplice may not corroborate another), 3.14 (criminal intent necessary to make one an accomplice), and 3.18 (testimony of accomplice to be viewed with distrust). The court did not instruct that Martino was an accomplice as a matter of law, but did give the following special instruction:

> "As a matter of law, witness Bill Baier is not an accomplice to the arson of the Matchmaker bar and his testimony need not be corroborated. The Court is expressing no opinion on the credibility of Mr. Baier, since you, the jury, are the exclusive judges of the credibility of the witnesses."

B. General Principles

Section 1111 provides:

> "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.
>
> "An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

It is settled that the trial court must, on its own motion, instruct on the pertinent principles of law regarding accomplice testimony " ' " . . . whenever the testimony given upon the trial is sufficient to warrant the conclusion upon the part of the jury that a witness implicating a defendant was an accomplice . . . . " ' " (*People v. Gordon* (1973) 10 Cal.3d 460, 466.) In order to be an accomplice, "the witness must have 'guilty knowledge and intent with regard to the commission of the crime.' [Citation.]" (*Id.* at pp. 466-467.) " 'An accomplice includes all persons concerned in the commission of the offense, whether they directly commit the act constituting the offense or aid and abet in its commission.' [Citation.]" (*Id.* at p. 468.) The definition also includes coconspirators. (*People v. McLain* (1988) 46 Cal.3d 97, 106; *People v. Jones* (1964) 228 Cal.App.2d 74, 94.) The defendant has the burden of establishing, by a preponderance of the evidence, that the witness is an accomplice. (*People v. Tewksbury* (1976) 15 Cal.3d 953, 968.) The fact the witness was prosecuted for the same offense as the defendant does not alone establish the witness as an accomplice. (*People v. Gordon, supra,* 10 Cal.3d at p. 467.)

Whether a witness is an accomplice may be either a question of law or of fact. If the material facts, including those concerning the witness's knowledge and intent, are in dispute or susceptible of conflicting inferences, the question is factual and must be submitted to the jury. Only when the facts and inferences are clear and undisputed may the trial court determine the witness is or is not an accomplice as a matter of law. (*People v. McLain, supra,* 46 Cal.3d at p. 106; *People v. Rodriguez* (1986) 42

Cal.3d 730, 759; *People v. Mayberry* (1975) 15 Cal.3d 143, 159; *People v. Gordon, supra,* 10 Cal.3d at p. 467.)

C. Failure to Instruct that Martino was an Accomplice as a Matter of Law

Moore contends the trial court should have told the jury Frank Martino was an accomplice as a matter of law. Absent this instruction, he says, the jury could have accepted Martino's testimony without first determining whether it was corroborated. The People counter that the trial court had no sua sponte duty to so instruct, and the question of Martino's accomplice status was properly submitted to the jury.

Martino's testimony established he burned the Matchmaker bar. There was no dispute over this point; the only issue was whether Martino did it on his own or at Moore's request. Martino was bound by his confession; his testimony made him an accomplice as a matter of law. (Cf. *People v. Robinson* (1964) 61 Cal.2d 373, 394.) The court should have instructed the jury accordingly. (*People v. Hoover* (1974) 12 Cal.3d 875, 880; *People v. Robinson, supra,* 61 Cal.2d at p. 394.)

The presence of a conflict between Martino's testimony and Moore's testimony regarding Moore's involvement in the arson did not, as the People contend, require the court to submit the question of Martino's accomplice status to the jury.[10] Neither the defendant's denial of any

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[10] The Attorney General advances a number of other theories in support of his assertion the question of Martino's status should have been submitted to the jury under appropriate instructions. We find it unnecessary to discuss them.

connection with the crime nor his presentation of evidence in conflict with the asserted accomplice's version of events generates a "dispute" which must be resolved by the jury. The issue is not the *defendant's* complicity in the crime, but instead the complicity of the *witness*. (*People v. Hoover, supra,* 12 Cal.3d at pp. 880-881.) The defendant's disavowal of any link to the offense does not generate a factual controversy if the evidence of the witness's connection with the crime is otherwise uncontradicted. (*Ibid.*) Here, Martino's testimony regarding his *own* participation in the crime was unchallenged.

The trial court should have instructed the jury that Frank Martino was an accomplice as a matter of law. "By telling the jury that corroboration of his testimony was required only if they found him to be an accomplice, the court impliedly and erroneously authorized the jury to find him *not* an accomplice, thereby making corroboration unnecessary." (*People v. Robinson, supra,* 61 Cal.2d at p. 394.) It does not follow, however, that reversal is required.

"Prejudice from failure to give proper accomplice instructions is measured by the test of *People v. Watson* (1956) 46 Cal.2d 818, 836 [citation], i.e., whether it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Heishman, supra,* 45 Cal.3d at pp. 163-164; *People v. Gordon, supra,* 10 Cal.3d at p. 470; *People v. Zelver* (1955) 135 Cal.App.2d 226, 232 [witness, by burning defendant's property, aided and abetted defendant in presentation of false insurance claim and was accomplice as matter of law; error in instructing such

witness was *not* accomplice furnished no cause for reversal unless error resulted in miscarriage of justice].) In determining whether the error was prejudicial, the reviewing court must examine the entire record (*People v. Gordon, supra,* 10 Cal.3d at pp. 470-471), and may consider whether it was "highly probable" the jury would have found independent corroboration of the accomplice's testimony. (*People v. Heishman, supra,* 45 Cal.3d at p. 165; see also *People v. Sanders* (1990) 51 Cal.3d 471, 511; *People v. Gordon, supra,* 10 Cal.3d at p. 473).

Adequate independent corroborating evidence is apparent here. (See *People v. Szeto* (1981) 29 Cal.3d 20, 27.) As we will conclude in a later section of this opinion (see II-D, *post*), the trial court did not err in instructing that Baier was not an accomplice. His testimony was clearly sufficient to corroborate that of Martino, and Moore does not contend otherwise.

Equally as significant is the fact the jury was given no evidentiary basis on which to conclude Martino was not an accomplice, as either an aider and abettor or perpetrator, aside from any question of Moore's involvement. Had the jury rejected Martino's testimony he set the fire, Moore would have been acquitted because there would have been no proof linking him to the cause of the fire. In this setting, it would be speculative and unreasonable to assume the jury rejected Martino's admission he was the arsonist. (See *People v. Gordon, supra,* 10 Cal.3d at p. 473.)

Finally, the statements of the court and both counsel to the jury made it clear Martino should be considered an accomplice. During voir dire the jurors were questioned

on the principles of accomplice testimony and the need for corroboration. They were told by the court that at least one accomplice would testify, and possibly two. In his opening statement, defense counsel said Martino knew he needed a corroborating witness, since he knew an accomplice's testimony had to be corroborated. In his summation, the prosecutor argued that Baier's statements to investigators, as well as other evidence, corroborated Martino's testimony. Defense counsel highlighted the instructions which required the jury to delete Martino's testimony and find independent corroboration before it could accept Martino's version of events, and then argued the necessary independent evidence was lacking. Under these circumstances, it is not reasonably probable Moore would have obtained a more favorable verdict had the jury been instructed Martino was an accomplice as a matter of law.

As an alternate argument, Moore contends defense counsel was ineffective for failing to ensure the omitted instruction was given. Moore's failure to establish prejudice precludes reversal on this ground. (*People v. Babbitt, supra,* 45 Cal.3d at p. 707; *People v. Heishman, supra,* 45 Cal.3d at p. 175; *People v. Ledesma, supra,* 43 Cal.3d at pp. 217-218; *People v. Fosselman, supra,* 33 Cal.3d at p. 584; see *Strickland v. Washington, supra,* 466 U.S. at pp. 687-696; *People v. Pope, supra,* 23 Cal.3d at pp. 425-426.)

D. Instruction that Bill Baier Was Not an Accomplice

Moore also contends the trial court erred in instructing the jury that Baier was *not* an accomplice as a matter

of law. He argues Baier either joined the Moore-Martino conspiracy to burn the Matchmaker and obtain the insurance money, or became an aider and abettor by conveying Moore's threat to Martino.[11]

Where a witness's intent and actions are subject to a variety of interpretations, the issue of his or her accomplice status should be left to the jury. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1170.) In the instant case, however, the evidence concerning Baier's intent and conduct was not subject to an interpretation he was an accomplice in the burning of the Matchmaker bar. "In order to be an accomplice, the witness must be chargeable with the crime as a principal (§ 31) and not merely as an accessory after the fact. (§§ 32, 33.)[12] [Citation.] An aider and

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[11] Moore's brief on this point is confusing. He may be claiming the trial court prevented him from establishing that Baier was a coconspirator or aider and abettor. If so, the record does not support the argument: although the court limited the evidence regarding Baier's involvement in the Monterey County check case, it did not prevent Moore from introducing evidence of Baier's involvement in the arson.

[12] Section 31 states: "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . , or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed."

Section 32 provides: "Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge

(Continued on following page)

abettor is chargeable as a principal, but his liability as such depends on whether he promotes, encourages, or assists the perpetrator and *shares* the perpetrator's criminal purpose. [Citation.] It is not sufficient that he merely gives assistance with knowledge of the perpetrator's criminal purpose. [Citations.]" (*People v. Sully* (1991) 53 Cal.3d 1195, 1227.)

Assuming Baier conveyed a threat to Martino at Moore's behest – a questionable proposition given Martino's testimony he never received a threat from Moore and Baier's testimony he was merely relaying a message – this was not enough to sustain a determination Baier was an aider and abettor. It does not show he acted with knowledge of Moore's criminal purpose "*and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) At the time the threat was allegedly conveyed, the bar had already burned; the offense of arson was complete. Even if the aim of the venture was to defraud the insurance company, so that arguably the crime continued until Moore received the insurance proceeds sometime in December, there was no evidence Baier conveyed the message to Martino with the intent or purpose of facilitating the commission of that offense.

(Continued from previous page)

that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony."

Section 33 establishes the punishment for accessories.

Nor does the evidence support a conclusion Baier joined a conspiracy involving Moore and Martino. "Conspiracy is a specific intent crime, with the intent divided into two elements: '(a) the intent to agree or conspire, and (b) the intent to commit the offense which is the object of the conspiracy. . . . " (*People v. Backus* (1979) 23 Cal.3d 360, 390.) "[T]he evil or corrupt agreement" is "the very crux of the conspiracy." (*People v. Lipinski* (1976) 65 Cal.App.3d 566, 575.) Here, there was no evidence or reasonable inference that Baier intended to agree, or did agree, with Moore or anyone else concerning the arson of the Matchmaker bar or the defrauding of the insurance company. Moore's theory in this regard "is at best highly speculative." (See *People v. Sully, supra,* 53 Cal.3d at p. 1228.)

At the very most, the evidence permitted an inference Baier was an accessory based on his conveyance of the threat to Martino. However, an accessory is not an accomplice. (*People v. Daniels* (1991) 52 Cal.3d 815, 867.) "[T]o bring an accessory within the section 1111's definition of accomplice, it must be demonstrated that the accessory acted with the same 'guilty knowledge and intent with regard to the commission of the crime.' [Citation.]" (*Ibid.*) In the present case, the proof only showed an intent on Baier's part to help Moore escape detection for the crime. A witness's efforts to aid the defendant after the defendant has committed the crime does not furnish an evidentiary basis for a finding the witness was an accomplice. (See *People v. Cisneros* (1973) 34 Cal.App.3d 399, 415.)

"In a case where it is not disputed that a witness was an accomplice . . . it is the duty of the court to state that fact positively to the jury [citation], but where . . . the

evidence shows that the witness was not an accomplice it certainly may not successfully be claimed that the court should have instructed that he was." (*People v. Featherstone* (1945) 67 Cal.App.2d 793, 796-797.) Here, the evidence at most proves Baier was an accessory after the fact. The court correctly refused to submit the matter to the jury.

III. Prosecution's Failure to Reveal Consideration Given to Baier

Moore contends he was denied due process because the prosecution did not disclose that Baier was not going to be prosecuted as an accessory to, or be subject to probation revocation proceedings as a result of, Martino's check scheme, nor was he going to be prosecuted for conspiracy to commit arson as a consequence of his attempt to conceal Martino's identity as the perpetrator. Moore states in part:

> "Here appellant asserts that with knowledge of Baier's crime committed, with Frank Martino [destruction of evidence in the check case], the Kern County District Attorney had indeed made an agreement with Baier that he would not be prosecuted for this crime, or, alternately, if not overtly making such a deal, had internally agreed to not prosecute him, and not directly telling him. Of course, Baier was then also under probation on a felony crime of kidnapping reduced to false inprisonment [*sic*] and he was not violated on his probation because of this crime.
>
> "Appellant here asserts that the prosecution must reveal all overt and covert considerations

> given to Bill Baier and when inquiry is made of Baier, who denied such an overt deal, the prosecution must reveal any plan to not prosecute/ violate probation even if that was not communicated to Bill Baier."

"Under the due process clause of the Fourteenth Amendment to the United States Constitution, the prosecution has a duty to disclose all substantial material evidence favorable to an accused, including evidence bearing on the credibility of a prosecution witness; the duty exists whether or not the evidence has been requested, and it is violated whether or not the failure to disclose is intentional. [Citation.]" (*People v. Hayes* (1990) 52 Cal.3d 577, 611.)

The flaw in Moore's argument is that it is not supported by the record. There is no evidence the district attorney's office made any decision regarding Baier's supposed complicity in the Monterey County crime or any other criminal activity. There is also nothing which suggests that anything went unrevealed. The jury was informed that Baier was on felony probation at the time of the fire and of trial. Baier and investigator Hodgson were both questioned at trial (and Baier at the preliminary hearing) regarding any consideration offered to Baier for his testimony, or any promises made in the arson case with respect to prosecution or revocation of probation. Additionally, Baier's probation officer testified that no request for violation of Baier's probation had been made.

Moore would have us speculate that because circumstances existed under which the district attorney's office might be expected to give overt or covert consideration to

Baier in return for testimony, the district attorney's office *did* give such consideration. It is not the function of this court to engage in guesswork or venture outside the record on appeal. If Moore has evidence to support this claim, he may seek habeas relief. (See *People v. Westmoreland* (1976) 58 Cal.App.3d 32, 36 ["Because appellants wish to go outside of the record to present additional evidence on a crucial constitutional point, each also has petitioned for a writ of habeas corpus"].)

IV. Exclusion of Moore's Version of Conversations with Baier and Defense Exhibit I

Moore next argues the trial court erred by (1) refusing to allow Moore to present his version of his conversations with Baier, and (2) excluding defense exhibit I. Moore says the mistake violated his Sixth Amendment rights and cannot be considered harmless under *Chapman v. California, supra,* 386 U.S. 18.

A. Facts

Baier's and Moore's respective testimonies regarding their conversations in late November and early December 1989 is recounted in the Statement of Facts, *ante*. In essence, Baier said he confronted Moore with Martino's statements, and Moore admitted paying Martino to burn the bar. Moore said the conversations had nothing to do with the bar, but concerned other criminal activity involving Martino, Palmer, and/or Baier.

The rulings of the trial court which Moore now challenges were made during his testimony. Defense counsel

first questioned Moore about the conversation with Baier which took place at Moore's home sometime after Thanksgiving. The following then occurred:

> "Q And what was his conversation with you at that point?
>
> "A He told me that he had received a phone call from Frank Martino and Frank needed a ride. He went over and picked him up and they drove to Democrat Hot Springs and –
>
> "MR. FIELDS [Prosecutor]: Object as hearsay and irrelevant.
>
> "THE COURT: I don't know what this has to do either. I know what you're getting at, but it has nothing to do with what we're trying here.[13]
>
> "MR. LORENZ [defense counsel]: There has been testimony about conversations between Mr. Baier and Mr. Moore.
>
> "THE COURT: Yes, there has been. And anything that bears on those conversations I'm willing to listen to, but not going off to Democrat Hot Springs.
>
> "MR. LORENZ: That's part of the conversation.

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[13] Some evidence suggested Baier was involved in destroying evidence in the Monterey County check case. Apparently this conduct was supposed to have occurred on the trip to Democrat Hot Springs.

"THE COURT: Then I don't want to hear it.

"MR. LORENZ: I don't see how you can prevent the defendant from stating what happened during those conversations.

"THE COURT: If it has anything to do with this fire that we're working on, I'm willing to hear it. If it doesn't, I don't want to hear it and the jury doesn't want to hear it.

"MR. LORENZ: I think I have to be very careful about the record I'm making here, Your Honor. Obviously, you know –

"THE COURT: She's taking down everything you're saying here.

"MR. LORENZ: – both sides of the case have an opportunity to present evidence.

"THE COURT: Absolutely, and anything that bears on this fire I'm willing to hear. I told you before, I'll give you cart [*sic*] blanche on anything that deals with the fire, but I don't want this thing muddied up with a lot of outside stuff that's not relevant to the issues that are in this case."

The jury was then asked to leave the courtroom, and defense counsel moved for a mistrial based on the court's comments. (See V, *post*.) Defense counsel argued he should be permitted to present evidence that the conversations had nothing to do with the arson, but instead had to do with the check case. Defense counsel made an offer of proof; the court said the evidence did not pertain to the fire. The following exchange then occurred:

"MR. LORENZ: . . . I'm asking him only about conversations between himself and Mr. Baier.

"THE COURT: They're admissible.

"MR. FIELDS: Your Honor, I think that what he's saying is he's denying that he ever told Bill Baier that he paid Frank Martino to start the fire. The extent of what the conversation is about is not relevant, but the fact that he denies that he ever said that is what's relevant.

"THE COURT He can bring in what he said or what he didn't say.

" . . . . . .

"MR. FIELDS: I think what you said before, that this is an attempt to muddy the waters, is the whole purpose of it. The conversation itself is not relevant. The fact that he's denying that he said he paid $1000, that part is relevant.

"THE COURT: That part is relevant, absolutely.

"MR. FIELDS: So the question should be: Did you tell Bill Baier that you paid him $1000? The answer is, no, I never told him that in any of our conversations. The extent of the conversation has nothing to do with the case.

"MR. LORENZ: No, the defendant has a right to present his side of the conversation also.

"THE COURT: He sure does.

"MR. LORENZ: Mr. Baier has testified extensively about his conversations with Mr. Moore. Mr. Martino has testified extensively

about conversations that he supposedly had with Mr. Moore. We deny those conversations. We don't deny conversations happened. We deny the content of those conversations as presented by those two witnesses.

"THE COURT: That's fine. If you want to ask Mr. Moore specifically about that, fine."

After further discussion, the court reiterated that defense counsel could ask questions about anything relevant to the fire, but that conduct such as destroying checks had nothing to do with this case.

After the jury returned, Moore resumed the stand. The questioning by defense counsel went as follows:

"Q (By Mr. Lorenz) Mr. Moore, did you ever have a conversation with Mr. Baier where you told him you paid Frank Martino $1000 to burn the bar down?

"A No.

"Q Any conversations like that ever exist?

"A No.

"Q Did you ever have any conversation with Mr. Baier about wanting to burn the bar down in general at any time period?

"A No.

"Q Now, You indicated that Mr. Baier came to your house a couple of times in November or December; is that correct?

"A Yes.

"Q There is some testimony on the part of both Mr. Martino and Mr. Baier about some type

of a killing situation. Did you ever ask Mr. Baier to put Mr. Martino in a box or anything like that?

"A No.

"Q Did you know what that situation was about between those two fellows, what their dispute was about?

"A No, I didn't.

"Q Did Mr. Baier relate anything to you about that?

"A Mr. Baier came to me and said that Frank was trying to hire somebody to kill him.

"....

"Q When Mr. Baier came to your house was the subject matter of your conversation about arson or the burning of the bar?

"A No.

"Q Did Mr. Baier present anything to you when he came to your house?

"A Yes, he did.

"Q And what was that?

"MR. FIELDS: Object, Your Honor.

"THE COURT: Let him get it in, but the contents are out.

"THE WITNESS: It was a police report from where Frank had been arrested in Salinas.

"Q (By Mr. Lorenz) Let me show you what's marked as Defendant's Exhibit I and see if that is familiar to you.

"A I only saw a portion of this police report.

"....

"Q Who presented that document to you?

"A Bill Baier.

"Q Was there anyone with him at that time?

"A Yes.

"Q And who was that?

"A Dan Palmer.

"Q About how long did you talk to these fellows on that occasion?

"A Five or six minutes, if that long.

"Q Now, [what] was that conversation about? I guess without getting into the content of that, was that conversation about the arson fire or was it about other criminal matters?

"A Other criminal matters.

"Q Concerning those two individuals?

"A Yes.

"Q And time-wise, do you know about when that situation occurred, they came out to your house with the police report and that sort of thing?

"A Around the 1st of December.

"Q Did you have any further contacts with Mr. Baier after that time?

"A Very little.

"Q Did you have any conversations with him about wanting to get some money for him and Mr. Martino to get out of town?

"A Yes, that was in – I think that was in the last part of November. He came to my house and told me that –

"MR. FIELDS: I'm going to object as to what was said, Your Honor.

"THE COURT: Does it have anything to do with the fire?

"THE WITNESS: I think it does. He's trying to get Frank Martino out of town. I don't know whether it has anything to do with the fire or not. I guess because of the checks. I don't know.

"Q (By Mr. Lorenz) Did you offer any money or assistance in getting either one of these fellows out of town?

"A No."

At the close of the defense case, defense counsel moved into evidence the various defense exhibits. The court objected to exhibit I; the prosecutor lodged an objection as well. The court admitted all defense exhibits except for exhibit I.

B. Discussion

Moore contends he should have been permitted to testify fully to the content of the conversations with Baier, pursuant to Evidence Code sections 356 and 1235. He also claims exhibit I would have supported his version of the conversations.

Evidence Code section 356 provides in part: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party . . . ." Evidence Code section 1235 states in relevant part: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing . . . ."

The record reveals the trial court permitted Moore to go beyond a mere denial that the conversations concerned the arson fire, and to testify generally that they had to do with other criminal activity involving Martino, Baier, and/or Palmer. The jurors were permitted to hear that defense exhibit I concerned Martino's Salinas arrest; they knew from previous testimony this was the check case. The prosecutor never disputed Moore's testimony regarding the subject matter of exhibit I. Under these circumstances, the court did not err in preventing Moore from testifying as to those portions of the conversations which involved details of other criminal activity, nor in excluding exhibit I.

It is apparent from the record the court and defense counsel were ships passing in the night. The court felt conversations about the check case were irrelevant because there was no showing the events in that case were linked to the arson case. Defense counsel was unable to convey the idea that such testimony was relevant *precisely* because the conversations did not concern the arson case. The testimony sought to be elicited by defense counsel was, *generally*, not irrelevant, and Moore was entitled to go beyond merely denying that the conversations concerned the burning of the bar.

This does not mean, however, that each entire conversation was automatically admissible. The provision of Evidence Code section 356 " ' "is necessarily subject to the qualification that the court may exclude those portions of the conversation not relevant to the items thereof which have been introduced." ' [Citations.] 'The rule is not applied mechanically to permit the whole of a transaction to come in without regard to its competency or relevancy. . . . ' [Citation.]" (*People v. Perry* (1972) 7 Cal.3d 756, 787, fn. omitted.) In other words, Evidence Code section 356 permits admission into evidence of the entire conversation, " ' "provided [the statements sought to be admitted] have some bearing upon, or connection with, the admission or declaration in evidence and are not excluded by a rule of law other than the hearsay rule." ' [Citations.]" (*People v. Barrick* (1982) 33 Cal.3d 115, 131, emphasis omitted.)

"No evidence is admissible except relevant evidence." (Evid. Code, § 350.) Thus, regardless of whether the proposed testimony falls within the ambit of Evidence Code sections 356 or 1235, it must be relevant in order to be admissible. " 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) A trial court has no discretion to admit irrelevant evidence. (*People v. Poggi* (1988) 45 Cal.3d 306, 323.) However, the trial court is vested with wide discretion in determining relevance. (*People v. Jackson* (1989) 49 Cal.3d 1170, 1187; *People v. Green* (1980) 27 Cal.3d 1, 19.)

Here, what was relevant was Moore's assertion the conversations concerned non-arson-related criminal activities of Martino, Baier, and/or Palmer. He was permitted to so testify. The details of those activities would have added little to the effect of his testimony. If the jury was unwilling to believe the conversations did not involve the fire, it would not have believed any additional details he may have supplied.[14]

Exhibit I was also properly excluded; assuming the contents were not inadmissible hearsay (see *People v. Baeske* (1976) 58 Cal.App.3d 775, 780-781; 1 Witkin, Cal. Evidence (3d ed. 1986) The Hearsay Rule, § 774, pp. 751-752), any nonhearsay purpose was accomplished when Moore was permitted to identify the subject of the police report, which the prosecutor did not dispute.

In any event, assuming the court erred, reversal is not warranted. Evidence Code section 354 provides in part: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of

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[14] This issue would not have arisen had the trial judge articulated an alternative evaluation under Evidence Code section 352. Although not verbalized, it appears the court may have felt the other criminal activity was a collateral matter, and that permitting evidence of its particulars would have resulted in a time-consuming mini-trial on Baier's alleged connection with it. A conclusion that the probative value of the fine points of the conversations was substantially outweighed by the resulting prejudice would have been well within the court's discretion.

resulted in a miscarriage of justice. . . . " (See *People v. Crowl* (1938) 28 Cal.App.2d 299, 313-315, applying "miscarriage of justice" standard to exclusion of defendant's version of conversation in which he purportedly confessed.) "[A]'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

We can make no such finding. The substance of the conversations was before the jury. (Contrast *People v. Murphy* (1870) 39 Cal. 52, where there is no indication the erroneously excluded portion of the conversation came before the jury in any manner.) Moore's version of events was bolstered by defense exhibit I. Although this document was not admitted into evidence, Moore was permitted to testify it was a police report concerning Martino's arrest in Salinas, which the jury knew involved the check case.

Without citing any authority, Moore claims that because he was the defendant, and "a competent and critical witness," error in excluding his testimony violated the Sixth Amendment and must be assessed under *Chapman v. California, supra,* 386 U.S. 18. He is wrong. "Although . . . a criminal defendant has a constitutional right to present all relevant evidence of *significant* probative value in his favor [citations], '[t]his does not mean that an unlimited inquiry may be made into collateral matters; the proffered evidence must have more than "slight-relevancy" to the issues presented.' [Citation.]" (*People v. Jennings* (1991) 53 Cal.3d 334, 372.) Applying

this measure, we are satisfied any error in the instant case was not so egregious as to assume constitutional dimension.

V. Exclusion of Impeachment Evidence

Moore contends he was denied his rights under the Sixth Amendment when the trial court (1) excluded evidence which would have allegedly tended to impeach Bill Baier for bias, and (2) commented on the relevance of the evidence.

As a preliminary matter, we note that aside from *Chapman v. California, supra,* 386 U.S. 18 and "Cal Jic" [*sic*] 2.20, Moore cites absolutely no authority for this portion of his argument. "Where a point is merely asserted [on appeal] by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion." (*People v. Ham* (1970) 7 Cal.App.3d 768, 783, disapproved on other grounds in *People v. Compton* (1971) 6 Cal.3d 55, 60, fn. 3; see also *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282.) Unsupported contentions are deemed to have been abandoned; the appellate court need not address them. (*Estate of Randall* (1924) 194 Cal. 725, 728-729; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 710; *Strutt v. Ontario Sav. & Loan Assn.* (1972) 28 Cal.App.3d 866, 873.) Arguably, the point raised here by appellate counsel, along with a number of others contained Moore's opening brief, could be summarily disposed of on this ground. We will, however, resist the urge to do so. (See *People v. Lewis* (1990) 50 Cal.3d 262, 282 [merits of issue discussed in order to forestall ineffectiveness of counsel contention].)

A. Facts

Moore called Steven Schroller as a witness. Schroller, an insurance claims investigator, was assigned to investigate an unrelated civil case involving the Matchmaker. The following colloquy occurred during his testimony:

> "Q [by Lorenz] . . . Was a witness identified to you by the name of Mr. Bill Baier who was an employee of the bar at the time of the incident?
>
> "A Yes.
>
> "Q Did you make arrangements to see that witness and interview him for your part of the case?
>
> "A Yes, I spoke with him on April 18th. I obtained his whereabouts . . . and I spoke with him on the afternoon of the 18th, arranged an appointment. . . .
>
> "Q Did he keep the appointment?
>
> "A I went to the motel. . . . He had decided he was not going to give us a statement or discuss the incident with us.
>
> "Q So he didn't cooperate with you at all in preparing a defense?
>
> "A No.
>
> "Q Did you find out later he had actually gone to Milton Younger to give him a statement?
>
> "A I knew that he was meeting with him on the evening of April 18th. He told me that when I talked to him on the phone. And then when I met with him on the morning of the 19th he told me he had indeed met with someone

from Chain-Younger and talked with them about it.

"Q They were representing the people that were suing the Matchmaker; is that correct?

"A Yes, right.

"Q Did he refuse to meet with you on any other occasion?

"A Right. As I understand, he went back to Hawaii. And we tried to follow up with a telephone call to him, but he wouldn't return the call.

"....

"Q [by Fields] Did this have anything to do with the Matchmaker fire?

"A No, that was on the shooting that occurred in July '89.

"Q And exactly which party would Carl Warren [Schroller's employer] represent?

"A We would be representing the Matchmaker and John Moore.

"Q Is there some reason why this information wouldn't be available by deposition?

"A Which information?

"Q Whatever information you needed from Bill Baier.

"A I contacted the attorney at the time of the meeting when Mr. Baier refused to give us a statement and asked him if they wanted to go ahead and prepare a subpoena at that time. And they indicated they did not want to do so at that time.

"Q So even the –

"THE COURT: What's this all about? This has nothing whatsoever to do with the case we're trying here, absolutely nothing.

"MR. FIELDS: I think the defense is offering it to show that Mr. Baier has a bias against Mr. Moore.

"MR. LORENZ: It is offered under Evidence Code Section 780. I don't have any problem citing cases to the Court. Case law indicates that we're given latitude in proving bias. Plus in this case it's a prior inconsistent statement. It's an inconsistent situation. The witness has testified that he's willing to be a witness in all pending civil actions, whatever, and this is exactly, of course, the opposite, proof of the opposite.

"THE COURT: The shooting has absolutely nothing to do with this case, absolutely nothing.

"MR. LORENZ: Okay. Well, if the Court recalls, the witness testified in this case pursuant to Mr. Fields' question that he had no problem being a witness for Mr. Moore in all these civil cases. As a matter of fact, he became a witness for the plaintiff in this particular case and refused to cooperate with the defense in this action whatsoever.

"THE COURT: Okay. It still has nothing to do with it."

Moore subsequently called as a witness attorney Calvin Stead. The following occurred:

"Q [by Lorenz] . . . Did you represent Mr. Moore of the Matchmaker bar in a case in the last year or so?

"A Yes, sir.

"Q Has that been settled or concluded at the present time?

"A It's not concluded. It's settled.

"Q Okay. Were you familiar with a witness in that case by the name of Bill Baier?

"A I never met Mr. Baier.

"Q Did you make attempts to contact him, knowing that he was an employee of the defendant John Moore?

"A Yes, we did.

"Q Would he cooperate with you at all?

"MR. FIELDS: I'm going to object on relevance and vagueness.

"THE COURT: I think we're at the same thing. I assume this has to do with the death at the Matchmaker bar, the gal that was shot.

"THE WITNESS: That's correct.

"THE COURT: It has nothing to do with this case.

"Q (By Mr. Lorenz) You were never able to talk to Mr. Baier?

"A No.

"Q In part because of information Mr. Baier gave to the other side of the case, did you settle the case?

"MR. FIELDS: I'm going to object.

"THE COURT: Just a second. What does settling that case got [*sic*] to do with this? Absolutely nothing. The objection will be sustained.

"Q (By Mr. Lorenz) Did Mr. Baier, however, give statements to the other side of the case, Mr. Younger's office?

"MR. FIELDS: Object.

"THE COURT: What difference does it make?

"Q (By Mr. Lorenz) You can answer that.

"THE COURT: No, he can't. The objection is sustained.

"MR. LORENZ: All right. Then I don't have any questions."

Defense counsel asked Moore whether Baier ever appeared as a witness for Moore in the federal cases. Moore replied that he appeared for a deposition. He also testified Baier was never a witness for him in the wrongful death case.

Defense counsel did not question Baier about his involvement in the lawsuit which arose from the shooting, other than to elicit that no one at the bar had anything to do with the incident or knew it was going to happen. Defense counsel questioned Baier about Moore's federal lawsuits against the Chief of Police and City of Bakersfield; Baier testified he was supposed to be a witness in at least one of those cases, and that if he were called as a witness, he would be a witness for Moore.

After further questioning by defense counsel, Baier admitted he may have once said something to the effect he would do anything to avoid going back in jail. Baier was also asked, by both parties, what authorities told him regarding whether he would be prosecuted or his probation revoked. Defense counsel was not permitted to ask whether Baier helped Martino destroy evidence in the check case, although the court inadvertently gave credence to the idea evidence had been destroyed by ruling, "If this is about the checks that were dumped in the river, it's completely irrelevant to the Matchmaker case."

Defense counsel made only a few inquiries of Baier about the conversation in which Moore allegedly admitted involvement in the fire. Counsel then sought to impeach Baier, as to this conversation, with Moore's description of the trip to Democrat Hot Springs (see IV, *ante*.). After the court told defense counsel it did not want the case "muddied up" with irrelevant information, the following occurred:

"MR. LORENZ: I think I'm going to have to make a motion.

"THE COURT: You can make two motions if you want to.

"MR. LORENZ: I'm going to have to do that right now.

"THE COURT: All right. Would the jury mind leaving and going into the jury room, please? Remember the admonition.

"(Whereupon, jury leaves courtroom.)

"THE COURT: All right. The record will show the jury has now left the courtroom. . . . Now –

"MR. LORENZ: First of all, I want to make a motion for a mistrial, based on the Court's prejudicial comments to the jury during the course of the presentation of the defense case. That's happened during the testimony of the witnesses in this case. The Court has given Its own opinion as to how the jury should view the testimony of these witnesses. That's been highly prejudicial to Mr. Moore.

"THE COURT: Mr. Lorenz, I haven't by any inkling of the imagination suggested to the jury what they should believe. In fact, I have bent over backwards to let you get anything in that you wanted to that has anything to do with this case. Now –

MR. LORENZ: I really sincerely disagree.

"THE COURT: You can sincerely disagree, but nevertheless I have told you before, anything that has to do with this case you get cart [*sic*] blanche to bring it in, I mean anything, but going up to Democrat Hot Springs to destroy some checks and so on has nothing to do with this case."

The court and counsel then proceeded to argue the evidentiary issues.

B. Discussion

1. Bias

Evidence Code section 780 states in relevant part:

"Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

"....

"(f) The existence or nonexistence of a bias, interest, or other motive."

" 'It is always proper for a party against whom a witness has given damaging testimony to show out of the mouth of the witness himself, if he can, or by other sources, if necessary, that such witness has an unusual interest in the outcome of the case. . . . ' [Citation.]" (*People v. Fatone* (1985) 165 Cal.App.3d 1164, 1174, emphasis omitted.) Although here, for the most part, defense counsel sought to establish Baier's bias through witnesses other than Baier, cases concerning the scope of cross-examination designed to test credibility are instructive. In this regard, the California Supreme Court has said:

"We recognize that ' "[w]hile the trial judge has broad discretion to control the ultimate scope of cross-examination designed to test the credibility or recollection of a witness (*People v. Burton* (1961) 55 Cal.2d 328, 343 []) . . . " ' (*Jennings v. Superior Court* (1967) 66 Cal.2d 867,

877 []), 'wide latitude should be given to cross-examination designed to test the credibility of a prosecution witness in a criminal case. (*Curry v. Superior Court* (1970) 2 Cal.3d 707, 715 [].) Nevertheless, we are unpersuaded by defendant's argument that the ruling was so unduly restrictive as to violate his Sixth Amendment right of confrontation.

"In *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 [], the United States Supreme Court reaffirmed that 'a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." *Davis v. Alaska* [(1974) 415 U.S. 308, 94 S.Ct. 1105], at 318.'

" 'But *Van Arsdall* emphasized that a trial judge has broad latitude in restricting cross-examination which is repetitive or only marginally relevant. (*Id.* [475 U.S. 673, 679-680].) There is no Sixth Amendment violation at all unless the prohibited cross-examination might reasonably have produced "a significantly different impression of [the witness's] credibility. . . . ")*Id.* [475 U.S. 673, 680].) If cross-examination was improperly restricted, the prejudicial effect of the error on the trial as a whole depends on a multitude of factors, including the cumulative nature of the lost information, the extent of cross-examination otherwise permitted, the degree of evidence corroborating the

witness, and the overall strength of the prosecution case. (*Id.* [475 U.S. 673, 684].)' (*People v. Rodriguez* (1986) 42 Cal.3d 730, 751, fn. 2 [].)" (*People v. Belmontes* (1988) 45 Cal.3d 744, 780; see also *People v. Sully, supra*, 53 Cal.3d 1195, 1220.)

Even if Moore is correct that the court's ruling was wrong under the foregoing principles, reversal is unwarranted, because Moore has failed to show the prohibited information "might reasonably have produced 'a significantly different impression of [Baier's] credibility. . . .' " (*People v. Rodriguez, supra*, 42 Cal.3d at p. 751, fn. 2.) The jurors knew Baier was on felony probation and did not want to return to jail. They also knew he was once fairly close friends with Martino, and spent a lot of time with Martino during the pendency of the latter's Monterey County case. The jury was informed that, while Baier gave a deposition in Moore's federal lawsuits, he did not cooperate with Moore's attorney and insurance investigator during the wrongful death suit but instead gave a statement to the opposing side. If, indeed, Baier gave statements to the plaintiffs' attorneys which resulted in that suit being settled, such information would have added little or nothing to what the jury already knew. Moreover, Baier's failure to cooperate with Moore in the wrongful death action is of little weight as an indicator of bias. Many reasons could exist why Baier acted as he did.

In addition, the exclusion of the evidence did not prevent defense counsel from arguing bias. Thus, at one point in his closing argument, defense counsel told the jury:

"Mr. Baier then, we talked a little bit about Mr. Baier. Mr. Baier is somewhat in the same

situation as Mr. Martino. Mr. Baier, when you cut it up and really listen to what he says, he doesn't say a whole heck of a lot. He's repeating what his good friend – at least at that time Mr. Martino says. And the first thing that concerns Mr. Baier is he does not want to go to prison. That's what's clearly on his mind at the preliminary hearing. Hey, wait a minute, I got a deal here, no felony revocation. He knows what his situation is. He's on felony probation status. He knows what his dealings with Mr. Martino are. He knows about the association clause, knows about some of the problems that are going to happen to him. And he's had a taste of jail; he doesn't want to go back."

Later, defense counsel argued:

"What you got, a few things you can check out about this fellow's testimony; he claims no bias, would willingly appear in other cases. As a matter of fact, shortly thereafter he totally refuses to cooperate with Mr. Moore's law firm in a wrongful death case and only cooperates with the plaintiff's part of the case. That shows you bias and it shows a switch. What could Mr. Moore do for Mr. Baier anymore? After the fire he's not an employee. Mr. Moore has let it be known he's going [*sic*] to loan anybody any more money. There's nothing there. The loyalty switches. . . . "

2. Court's Remarks

The trial court's comments likewise do not furnish cause for reversal, either by themselves or on the ground

they might have misled the jury into disregarding the evidence of bias that was admitted.

"A California trial court may comment on the evidence, including the credibility of witnesses, so long as its remarks are accurate, temperate, and 'scrupulously fair.' [Citation.] Of course, the court may not express its views on the ultimate issue of guilt or innocence or otherwise 'usurp the jury's exclusive function as the arbiter of questions of fact and the credibility of witnesses.' [Citation.] The propriety and prejudicial effect of a particular comment are judged both by its content and by the circumstances in which it was made. [Citation.]" (*People v. Melton* (1988) 44 Cal.3d 713, 735.)

The challenged comments should undoubtedly have been left unsaid. A simple "sustained" or "overruled" would have sufficed as a ruling on any objections, and further reasons should have been stated out of the jury's hearing. Jurors are " 'apt to give great weight to any hint from the judge as to his opinion on the weight of the evidence or the credibility of the witnesses. . . . ' " (*People v. Cook* (1983) 33 Cal.3d 400, 407, overruled on other grounds in *People v. Rodriguez, supra*, 42 Cal.3d at p. 766), and we can think of no good reason why a trial judge should flavor his or her evidentiary rulings with rhetorical comments such as those uttered here. Nevertheless, the judge's remarks concerned evidentiary determinations. At no time did the court indicate any opinion as to a witness's credibility or regarding the outcome of the trial.

Judicial misconduct arising out of a trial court's statements in ruling on an objection normally cannot be raised

on appeal absent an objection and request for admonition in the trial court. (*People v. Terry* (1970) 2 Cal.3d 362, 398.) An exception exists when an objection and admonition could not cure the prejudice caused by the improper remarks. (*Ibid.*) When a timely objection would have enabled the court to dispel any misunderstanding with an appropriate admonition, any asserted error is waived on appeal by a failure to call the incident to the court's attention when it takes place. (*People v. Wright* (1990) 52 Cal.3d 367, 411; see *People v. Anderson* (1990) 52 Cal.3d 453, 469.)

In the instant case, defense counsel did not timely object, although he did move for a mistrial. If counsel felt the court's remarks were prejudicial, he should have objected earlier; any misunderstanding which may have arisen could then have been easily and effectively dispelled. The court could have either ceased editorializing or, at the least, explained to the jury that it was only rendering a legal determination with regard to the admissibility of evidence, and that the jurors should draw no inference from the manner in which the decision was articulated.

Additionally, the motion for mistrial was properly denied. "A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]" (*People v. Haskett* (1982) 30 Cal.3d 841, 854.)

Here, the record suggests the court was not hostile toward counsel, but rather had slipped into the bad habit of accompanying its evidentiary rulings with unnecessary gloss, which sometimes will be found to be reversible error. (See, e.g., *People v. Pitts* (1990) 223 Cal.App.3d 606, 795-796, 815; *People v. Fatone, supra,* 165 Cal.App.3d at pp. 1170-1181.) As noted, defense counsel did not object initially and, in fact, did not seek to have the jury admonished after the court denied his mistrial motion.

Moreover, the court gave proper cautionary instructions to the jury at the close of trial. (See *People v. Hess* (1970) 10 Cal.App.3d 1071, 1081. It stated:

> "I have not intended by anything I have said or done or by any questions that I may have asked or by any ruling that I may have made to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness. If anything I have done or said has seemed to so indicate, you will disregard it and form your own opinion."

We must presume the jurors followed this instruction. (See, e.g., *People v. Beach* (1983) 147 Cal.App.3d 612, 624.) We must also presume they followed CALJIC No. 2.20 which, as given by the trial court, stated they were the sole judges of the believability of the witnesses and, in determining believability, they could consider anything having a tendency in reason to prove or disprove the truthfulness of a witness's testimony, including "the existence or nonexistence of a bias, interest or other motive."

In sum, the jurors were told they were free to consider evidence of bias or motive, and sufficient impeachment evidence was admitted to enable them to make a knowledgeable determination as to Baier's credibility. The court's remarks, while not recommended, nonetheless were not prejudicial under the circumstances of this case.

VI. Abstract of Judgment

Although not pointed out by either party, the abstract of judgment incorrectly shows that Moore was convicted after a *court* trial. While the discrepancy is probably of no critical effect, it should be corrected. The trial court will therefore be directed to prepare an amended abstract of judgment which reflects a conviction after a *jury* trial on both counts, and to forward a certified copy of same to the appropriate authorities.

VII. Imposition of Sanctions

California Rules of Court, rule 37, provides that a brief in a criminal case, in which the death penalty was not imposed, may not exceed 75 pages "unless a longer brief is permitted by the presiding justice for good cause." Moore's brief is 77 pages long. When the court granted appellate counsel, Roger S. Hanson, permission to file the brief, it reserved the option to impose sanctions "if upon review of the brief the excess of authorized pages was unwarranted." Having now labored through the brief, we can say with confidence most of it was unnecessary and unwarranted. It consistently presented argument in the guise of fact, offered little authority that

was on point, and included an entire argument which should have been advanced by way of a writ petition.

Moreover, 51 of the 77 pages are taken up by the statements of the case and facts. Pages 2 through 11 summarize evidence from the preliminary hearing; other pages are devoted to recapping *in limine* motions that are entirely irrelevant to any issue raised on appeal. This portion of the brief incorporates a mind-numbing, distracting mass of irrelevant minutiae. This gem, from page 17, is typical: "The opening statement of the People concluded, (R.T.A. 170) and counsel for appellant gave his opening statement (R.T.A. 170-182)."

Were counsel appointed, we would not approve full payment of his fee request. However, since counsel is retained, and since the brief exceeded the limit by only two pages, we will not impose monetary sanctions in this instance.

DISPOSITION

The judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment which shows Moore was convicted of both counts of the information after a *jury* trial, and to forward a certified copy thereof to all appropriate authorities.

/s/ Dibiaso
Dibiaso, Acting P.J.

WE CONCUR:

/s/ Vartabedian
Vartabedian, J.

/s/ Harris
Harris, J.

APPENDIX B

Fifth Appellate District No. FO14712
S024536

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Respondent

V.

JOHN WRIGHT MOORE,
Appellant

(Filed Feb. 19, 1992)

Appellant's petition for review DENIED.

/s/ Baxter
Acting Chief Justice